REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1938,
AND JANUARY TERM, 1939

VOLUME CXXXV

HENRY P. STODDART

OFFICIAL REPORTER

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By HENRY P. STODDART, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

CHARLES A. GOSS, Chief Justice[1]
ROBERT G. SIMMONS, Chief Justice[2]
WILLIAM B. ROSE, Associate Justice
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice[3]
BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
HARVEY JOHNSEN, Associate Justice[4]

HENRY P. STODDART	Reporter
GEORGE H. TURNER	Clerk
ELBERT M. WHITE	Deputy Clerk
RICHARD C. HUNTER	Attorney General
WALTER R. JOHNSON	Attorney General[5]
JOHN L. RIDDELL	Chief Assistant
GEORGE W. AYRES	Assistant Attorney General
C. S. BECK	Assistant Attorney General
RUSH C. CLARKE	Assistant Attorney General
DON KELLEY	Assistant Attorney General
H. EMERSON KOKJER	Assistant Attorney General
EDWIN VAIL	Assistant Attorney General

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[1]August 13, 1938, Chief Justice Charles A. Goss died.
[2]November 12, 1938, Chief Justice Robert G. Simmons was appointed.
[3]November 22, 1938, Associate Justice L. B. Day died.
[4]January 3, 1939, Associate Justice Harvey Johnsen was appointed.
[5]Succeeded Richard C. Hunter.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Wilmer W. Wilson	Neb. City
Third	Lancaster.	Jefferson H. Broady	Lincoln
		Ellwood B. Chappell	Lincoln
		John L. Polk	Lincoln
		Frederick E. Shepherd	Lincoln
Fourth	Burt, Douglas and Washington.	William A. Day	Omaha
		Francis M. Dineen	Omaha
		James M. Fitzgerald	Omaha
		Charles Leslie	Omaha
		Herbert Rhoades	Tekamah
		John A. Rine	Omaha
		Willis G. Sears	Omaha
		Arthur C. Thomsen	Omaha
		John W. Yeager	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings	David City
		Harry D. Landis	Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner	Columbus
		Frederick L. Spear	Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Robert M. Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Charles H. Stewart	Norfolk
		Adolph E. Wenke	Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge	Hastings
		Frank J. Munday	Red Cloud
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edwin P. Clements	Ord
		Ernest G. Kroger	Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Isaac J. Nisley	North Platte
		J. Leonard Tewell	Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Clyde B. Ellis	Beatrice

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Admitted since the Publication of Vol. 134

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CRAWFORD, JEANNETTE M.
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DINAN, EMMETT MICHAEL
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JAMESON, JOHN H.
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PRICE, WALTER W.
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STOAKES, LUCIEN H.
TSCHANTZ, HARRY L.
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WELLAUER, ALFRED A.
YOUNG, DON C.

IN MEMORIAM

CHARLES A. GOSS

At the session of the Supreme Court of the State of Nebraska, October 17, 1938, there being present Honorable William B. Rose, Chief Justice, Honorable George A. Eberly, Honorable L. B. Day, Honorable Bayard H. Paine, Honorable Edward F. Carter, and Honorable Frederick W. Messmore, Associate Justices, the following proceedings were had:

May it Please the Court:

As we meet here in this room where so recently presided the man whom we today commemorate, we do not so much sorrow at his death as rejoice in his life. To all of us here present it has been given to know him personally—some for many years, some for but few; some intimately, others casually; but each of us from our contacts with him has received something of inspiration, or cheer, or faith.

It is good to have known Judge Goss and it is fitting now to review briefly the record of his life.

Charles A. Goss was born at Edinburg, Ohio, on December 10, 1863. His father, Alfred Ruggles Goss, came from Massachusetts of a line that extended back into Colonial days, and his mother, Martha Carr Goss, was born in Edinburg, Ohio. From them he inherited qualities which gave strength, stability and serenity to his character.

He prepared for college in the village school, clerked in his father's store, took a business course, and entered Mt. Union College, where he studied the liberal arts and became the best hitter on the college baseball team, and from which he graduated in 1885, with the degree of A. B. He taught several terms in country schools, meantime reading law, and in the spring of 1886 came west, arriving in April of that year in Omaha which became his home thenceforth. He continued the study of law and for a time taught in the schools of Douglas county. On December 10, 1887, his twenty-fourth birthday, he was admitted to the Bar be-

fore Honorable George W. Doane, District Judge, and entered upon the practice of his profession in association with H. L. Day. In 1888 his alma mater conferred upon him the honorary degree of Master of Arts. Having become established in his chosen field, he was married on October 4, 1890, to Miss Carrie Shimp, of Alliance, Ohio, a union which continued happily for more than forty-six years until her death in December, 1936.

The young lawyer took an active interest in the civic affairs of the community and in November, 1892, was elected to the Nebraska House of Representatives and served during the twenty-third Session of the Legislature. He was chairman of the Douglas County Republican Central Committee from 1901 to 1903 and in 1906 was appointed by President Theodore Roosevelt United States District Attorney, filling the office for four years during which he successfully conducted much important litigation in behalf of the Government.

His judicial career began in February, 1920, when on the recommendation of the Bar of the Fourth Judicial District he was appointed by Governor McKelvie to fill the unexpired term of Judge George A. Day who had become a member of the Supreme Court of Nebraska. He remained on the District Bench until December 31, 1926, when he resigned in order soon to assume the duties of Chief Justice of this Court, to which high office he had been elected in November of that year, and to which he was reelected in 1932. His service here began January 6, 1927, and continued until his death, which occurred in Chicago on August 13, 1938, during a visit to his daughter and her family. He is survived by his daughter, Mrs. J. D. Pollock of Chicago and her two children, and by a brother and two sisters.

Last December, on his seventy-fourth birthday and the fiftieth anniversary of his admission to the Bar, Judge Goss announced that he would not be a candidate for reelection.

He had been in active practice for thirty-two years, associated at different times with H. L. Day, Judge Joseph H. Blair, James H. McIntosh, Francis A. Brogan, and Warren

Switzler, among others. He served for not quite seven years as District Judge and for almost twelve years as Chief Justice of the Supreme Court.

He was deeply concerned with all that affects the welfare of our profession and was an active member of the Omaha, the Nebraska, and the American Bar Associations, and attended their sessions quite regularly. Indeed, he had been in attendance upon the meeting of the American Bar Association in Cleveland shortly before his death. He was President of the Omaha Bar Association in 1908. He was a member of the American Law Institute and was greatly interested in its work, its purposes, and its accomplishments. In recognition of his attainments and his services in the administration of justice, the degree of LL. D. was conferred upon him by Mt. Union College in 1935.

The interest and the activities of Judge Goss were not limited to those matters which directly relate to the science of jurisprudence or the art of practicing law. His was a well-rounded life, of broad vision and wide sympathies which found expression in helpful service in civic, philanthropic, social and religious organizations.

It was characteristic of him that in little more than a month after arriving in Omaha he had become a member of the First Methodist Episcopal Church of that city, and that at the time of his death he had served continuously on its Official Board for more than forty-five years. He was long a trustee of the Nebraska Methodist Hospital. He had represented his church as a lay delegate to the General Conference of the National body. He served for more than a quarter of a century as a member of the State Board of the Young Men's Christian Association and for many years was a director of the local association in Omaha.

He found time too for fraternal and other associations and was a thirty-second degree Mason, as well as a member of the Elks. He was fond of the great out-of-doors and in his youth had been a notable baseball player—in later life, a golf enthusiast.

He was also a member of the Society of Colonial Wars and of the University Club.

The life of the lawyer is devoted to the service of others and high standards of ethical conduct are emphasized by our honorable calling. Moral qualifications are quite as essential as legal knowledge and intellectual capacity. No lawyer can be truly great without possessing unswerving integrity, unfaltering courage, unwavering loyalty to truth and justice, and unsullied honor.

Such sturdy character Judge Goss manifested and his consistent life is an example to be cherished and to be followed.

He possessed, in addition, the judicial temperament, so desirable in a judge. He presided over the court with dignity and courtesy, listened attentively and patiently to the arguments of counsel, with an open and an alert mind, gave careful and studious consideration to matters presented for determination and rendered conscientious decisions and opinions well reasoned and well expressed.

An able lawyer, a just judge, an upright citizen, a genial friend, a devoted husband and father, a kindly, modest, Christian gentleman—Charles A. Goss has contributed much of lasting good to the State in which he so long lived and so well wrought.

Let us, therefore, place upon the records of the Court our appreciation of his character and his service, and let a copy thereof be transmitted to his daughter.

HARLEY G. MOORHEAD
HARVEY JOHNSEN
CHARLES LESLIE
THOS. C. MUNGER
HOWARD KENNEDY
Committee

Honorable Harley G. Moorhead.

May it Please the Court:

I would like to add a few remarks as my individual, personal expression in memory of my good friend, Judge Goss.

It was my good fortune to be associated with him in 1902, when I started my law practice in Omaha. He was most generous of his time in explaining matters of practice and procedure, as well as of substantive law. He gave me the benefit of his experience in applying those principles to the actual cases and the realities of life.

There was a friendliness in his voice, which I am sure has been noted by you; there was also an honest interest and desire to give good counsel. In fact, all through his years of practice, as well as during his years as Judge of the District Court and as Chief Justice of this Court, he went far out of his way to encourage lawyers with less experience. I think I voice the sentiments of hundreds of lawyers in saying that this same friendly, sympathetic attitude, free from pompous austerity, was a bulwark to them in moments of uncertainty, bashfulness and discouragement. High ethical standards were adopted and practiced by him and were also held out as the only true avenue to success in the legal profession.

Judge Goss radiated happiness,—a great asset to any one. A desire for good, clean fun and a fine sense of humor were other characteristics. He was a staunch Methodist, yet he was a Liberal and very human in his rules of conduct and discipline. In public relations he was always a Christian gentleman, but never the long-faced or intolerant type.

I recall Judge Goss as an ideal family man, absorbed in the happiness and welfare of his lovely wife and vivacious daughter. Nearly every morning as he came to the office, he would have an interesting family anecdote to relate. It usually had to do with his daughter, who was the "apple of his eye". In this way we came to know his family just about as well as we knew our own relatives.

Judge Goss created an atmosphere of good-will in our office and, I dare say, in every office and in every group of Judges where he labored. This quality of his,—good-will (some people call it love),—is one which goes such a distance to bring about "Peace on Earth".

Honorable Harvey Johnsen.

May it Please the Court:

To those qualities of Judge Goss which have been pointed out, I would add one attribute that I deem professionally important—his participation in the meetings and activities of the Bar. Year after year I have found him at the annual meeting of the American Bar Association. He was always in attendance at the annual meeting of the Nebraska State Bar Association. He never willingly missed an annual field day of the Omaha Bar Association.

Such professional interest and contact on the part of a Judge are worthy of note and commendation. The Bench and Bar need constantly to remind each other of their unity. At times we have stood somewhat apart, in ostracism that is self-imposed. By mutual contact I believe we realize more fully that our task is common,—not merely that we have the same objective, but that there is only one path by which it can be reached, and that we must go shoulder to shoulder.

Whatever Judge Goss' example of meeting and fraternizing with the Bar may have contributed in that direction,—and I believe it has made a contribution,—we may well take note of and honor on this occasion.

Honorable Willis G. Sears.

May it Please the Court:

I speak a word for the Bench of the Fourth Judicial District, of which Judge Goss was an honored member before coming to the Chief Justiceship, which he occupied at the time of his death.

If I were asked what there was about Judge Goss that his oldest friends would longest remember, I would choose as his most dominant quality his normality. Thrice blessed is the man, or community, or nation that is normal. For therein is kindliness, consideration, patience, industry, and, in fact, all the virtues. Of these Judge Goss was possessed

in full measure. Tricks were unknown to him. He did not have to study "ethics"; he was born with them. His best friends were his oldest ones. Every place he filled in the family or in the public service was better because of his presence there. All of his performance was the best he could give, and all who came into relation with him were better for that contact.

We will cherish his memory as a citizen, lawyer, and judge, and his dust has returned to the ashes of the past wherein we, each and all, have an abiding interest.

William B. Rose, Chief Justice.

In performing judicial duties, Judge Charles A. Goss observed the worthy traditions and high ideals belonging to the exalted position of Chief Justice. He presided with dignity and commanded respect. There was never any unseemly conduct at the Bar or in the consultation room. He heard every cause attentively and gave conscientious consideration to the questions presented and to the views of his associates. His own convictions were expressed pleasantly but decisively.

In the preparing of opinions, Chief Justice Goss performed his full share of the work in addition to his duties as presiding officer. How a decision would affect him personally did not enter into his deliberations or conclusions as a Judge. He did not allow friendship, religion or politics to influence him in a decision. He accepted without a murmur the personal consequence of a deliberate judgment.

His power of concentration and his keen perception were distinctive attributes of his mind. Otherwise the volume of his work, as shown by court records, would have been impossible.

He was diligent and exacting in the performance of duty. He observed the progress of each case assigned to an associate for an opinion and prevented delays whenever possible.

The purity of Judge Goss' life, the kindness of his heart, his pleasant relations with his associates on the Bench, and

his passion for whatever seemed to him to be right and lawful in the administration of justice, endeared him to all of us. We who survive will cherish his memory and emulate his virtues.

The resolutions presented by the committee and the tributes delivered by members of the Bar are appreciated and approved by the Court.

The memorial proceedings will be spread at large upon our permanent records and published in the current volume of Reports.

IN MEMORIAM

L. B. DAY

At the session of the Supreme Court of the State of Nebraska, February 20, 1939, there being present Honorable Robert G. Simmons, Chief Justice, Honorable William B. Rose, Honorable George A. Eberly, Honorable Bayard H. Paine, Honorable Edward F. Carter, and Honorable Frederick W. Messmore, Associate Justices, the following proceedings were had:

May it Please the Court:

The Creator, as a part of His scheme of things, ordains that each shall live to a certain day, and no longer, and by reason of that law, immutable and existent since the Creation, it is the common lot of mankind to witness and mourn the passing of a friend.

However, the Creator, in His great love and wisdom, has generously given to us the power to assuage our grief by indulging in recalling our friends in fond recollection, and to dwell upon those things which aroused our admiration and respect, and to recall with warm and pleasant memories the things which caused us to love him.

And today we have come together so to recall our friend L. B. Day.

L. B. Day was born on the 3d day of February, 1889, at Westboro, Missouri, and died on the 22d day of November, 1938, at Lincoln, Nebraska. While a young lad his family moved to Albion, Nebraska, where he attended the public schools, and graduated from the Albion High School in 1907. He then entered Creighton College at Omaha, and received his A. B. degree in 1911, and graduated from the Creighton Law School in 1914, and was ad-

mitted to the Bar of the State of Nebraska in the same year. He immediately entered the practice at Omaha, and was soon recognized as one of the leading and forceful young lawyers of the Omaha Bar.

After but six years of active practice, he had acquired such prominence that he was elected a Judge of the District Court of the Fourth Judicial District. He served as a District Judge for eight years, with such distinction and honor, that his friends and neighbors conferred further honor upon him, electing him to the high position of an Associate Justice of this Honorable Court.

He assumed his place on this Court on January 3, 1929, for a term of six years, and it is significant to note that at the expiration of his term he was unopposed for a succeeding term. His untimely death occurred during his second term as a member of this Court, at the early age of forty-nine years.

It is not necessary that we at this time make it a matter of record that his integrity was beyond question, that he was industrious and conscientious, that his ability as a jurist was outstanding, for that record was made by him from day to day while he was with us.

The opinions of this Court by Justice L. B. Day, the judgments of the District Court rendered by Judge L. B. Day, will testify as to his ability and honor in language more eloquent than any which is at our command, and as long as our Commonwealth shall endure.

Judge Day did not limit his interest and effort to his work on the Bench; he was likewise deeply interested in the welfare of the Bar, and gave freely of his time and effort to Bar activities, persistently, and with characteristic energy striving to raise the standards of admission and practice, and to improve the services rendered the public by the Bench and Bar.

At the time of his death he was Chairman of the Resolutions Committee of the American Bar Association, and undoubtedly would have risen to greater heights in that Association had he lived.

He was President of the Nebraska State Bar Association

for the year 1935, and it was largely by reason of his desire, influence, and leadership, that an Integrated Bar in the State of Nebraska is an accomplished fact.

L. B. Day and Neva Emma Grimwood were united in the holy bonds of matrimony on the 10th day of April, 1916, and he is survived by Mrs. Day and their three children, Frank Edmund, Robert Grimwood, and L. B.

This Court has lost a most able member, the Bar has lost a friend and leader, the Commonwealth a great and distinguished citizen, the family a loving husband and a kind father.

Our finite minds cannot understand
That which our eyes behold,
Done in accordance with a decree
Of the Great Chief Justice.
Why one so good and so worthy should be
stricken in the full strength of his years,
And taken from his home and his friends,
Causes us to meditate and wonder the purpose,
for purpose there must be.
We cannot fathom the answer,
We can but bow our heads in sorrow and say
"Thy Will be Done."

Your Committee feels that it is befitting and proper, and therefore moves the Court that these proceedings be made a part of the permanent record of the Court so that those who will come after us may know the great esteem and love we held for L. B. Day, and our sorrowful regret that he is no longer with us; and, as a mark of respect and sympathy, your Committee further moves the Court that the Clerk be authorized to send a certified copy of these proceedings to the bereaved family.

Respectfully submitted,

DAVID A. FITCH
JOHN W. DELEHANT
JAMES M. FITZGERALD
FRANCIS P. MATTHEWS
FRANK D. WILLIAMS

Honorable Raymond M. Crossman, in behalf of the Nebraska State Bar Association.

May it Please the Court:

The Honorable L. B. Day, Justice of this Court, was admitted to practice of the law by this Court on May 1, 1914, became a member of the Nebraska State Bar Association in 1916, and served as president of the Association during the year 1935.

We, of the Nebraska State Bar Association, therefore deem it most fitting that we should join with Bench and Bar on this occasion, to pay our special tribute and our respect to one so long an active member, and to a former leader of our Association.

In 1921 Judge Day, then serving upon the District Bench of Douglas County, was a member of the Committee on Legislation, through whose influence and activities the following legislation was enacted:

1. A provision for verdict by 5/6 of a jury in civil cases.

2. A provision that a judgment in criminal actions shall not be reversed by reason of error in the Trial Court not affecting the substantial rights of the defendant.

3. Recognizance in criminal cases was made continuous from term to term until final judgment.

4. An extension of the jurisdiction of District Judges in Chambers.

5. Establishment of a state custodial farm for first criminal offenders.

In 1933 Justice Day, then serving upon this Court, was Chairman of the Committee on Legal Education, which made an extensive investigation of the subject and a noteworthy report. The pronouncement of that Committee is worthy of inclusion here:

"Your committee recommends that the standards proposed by the American Bar Association should be adopted as the ultimate goal to be obtained in legal education in this state and that the Committee on Legal Education study the situation in the state and make practical recommendations for the raising of the standards of legal education

until they conform to the present standards of the American Bar Association."

This and subsequent recommendations with reference to raising the standards for admission to practice have been recognized from time to time by adoption of rules of this Court in which Justice Day participated.

The full purpose of his considered opinion and the reason for his intense interest in raising the standards of the Bar found best expression in his annual address upon the subject "The Independence of the Judiciary" as president of our Association in 1935, at which time he said:

"The future status of the Courts in our scheme of government depends largely upon the opinions and influence of the Bar. The Bar has always exercised a pronounced influence upon questions relating to the scientific administration of justice. It can and undoubtedly will continue to do so, but it can serve the public welfare better through efficiently organized efforts than through unorganized and unconnected efforts.

"If constitutional government is to endure, there must be respect for the law as administered by the courts and the officers of the courts. Respect for the law will only obtain if the administration of justice is free from political interference. The independence of the judiciary is necessary to maintain constitutional government. Only constitutional government guarantees human liberties against the usurpation of power."

We may well recall that, when these words were spoken, there was most earnest discussion of the integration of the Bar of Nebraska, and that Justice Day again as a member of this Court joined in the opinion for the adoption of the rules which effected that purpose.

It was these outstanding activities in the Nebraska State Bar Association and Justice Day's active and avowed interest in an organized and more effective Bar that gave him recognition and leadership as a representative of Nebraska in the reorganization of the American Bar Association and accorded to him a position of high rank in its counsels.

This, then, as we of the Bench and Bar would say, is the record which has been made and which we recall and review upon this occasion.

To briefly summarize, Justice Day believed that a high qualification for admission to the Bar and a strongly organized and an Integrated Bar, by its influence and by its conduct, contributed definitely to the independence of the Judiciary. And to repeat his own estimate, that an independent Judiciary was the only guarantee to the people of the preservation of their constitutional liberties.

There can be but one judgment upon such a record, and that is an acknowledgment of deep gratitude by the citizens, by the Bar, and by the Bench, for such a lawyer and for such a Judge.

The Nebraska State Bar Association hereby gratefully records this contribution to its organization and to its interests by one of its foremost leaders.

May it Please the Court:

On motion duly made and carried, the Omaha Bar Association, on Thursday, February 16, 1939, authorized its Memorial Committee to prepare and present at the Memorial service for the late Honorable L. B. Day, to be held in the Supreme Court, in Lincoln, Nebraska, on Monday, February 20, 1939, at nine o'clock a. m., a resolution appropriately expressing for him the respect and admiration of the Omaha Bar Association.

We meet here today to honor one formerly a member of this Court, one who has heard his last argument, written his last opinion, and has been called before the Bar of Eternity. Men are born, they grow, they struggle, they decline and they die. Some survive the vicissitudes of youth and middle age and are suffered to attain a long life of usefulness. Some are stricken down when apparently at the zenith of their usefulness, as was Judge Day.

However, the accomplishments of good men are not to be measured by calendar years. The accomplishments of

him whom we symbolize today would be a credit to one privileged to attain the maximum time alloted to human life. His chair upon the Supreme Bench was vacated by his untimely death. No longer will the citizenry of this state receive the benefits of his judgment. His voice has been silenced by the grave. This silence abounds with fond recollection of a life well lived, deeds well done, all worthy of remembrance. In this memorial it is impossible to briefly present a wholly adequate characterization of Justice L. B. Day.

His industry and integrity were outstanding qualities which were ever present in his life's work as a citizen, as a lawyer, and as a Judge. His industry was circumscribed by his integrity whereby his work was ever constructive, making for the good of the community and the state.

Justice Day moved to Nebraska at an early age and resided in the state until his death. He secured his education at Creighton University, and in 1914 began his practice of law in the City of Omaha, where he practiced until November, 1920, when he was elected as Judge of the District Court of the Fourth Judicial District to take office in January, 1921. However, before taking office, he was appointed by the Governor to serve as a District Judge to fill out the unexpired term of Judge Lee Estelle, deceased. He served efficiently in that capacity until he was elected Associate Justice of the Supreme Court of the State of Nebraska in January, 1929, in which Court he served until the time of his death.

His characteristics, which later helped him serve the public so well, were present in his youth and early manhood. He was what is sometimes said to be a self-made man, depending upon his own resources, which constituted that undefeatable, that never terminating disposition to prepare himself for a high place in later years.

His purpose in life was not to gain an honorable position alone, nor to seek only the things material, but throughout the building of his character he unselfishly contributed to the church and other civil activities in the community in which he lived.

Justice Day was not only a student of the laws made by man, but he was also a student of the divine law and reconciled the two when rendering an opinion. He was a very religious man. He was not unmindful of the duties he owed to God and his fellowmen. He believed that men were judged by their works as well as their words.

In his daily life he took every opportunity to exemplify the parable of the Good Samaritan. There are those active in business or professions today who in their youth obtained inspiration from him and benefits of his counsel and even financial help.

Judge Day was a member of the Presbyterian Church. He was faithful to the teachings of the Lord and helped to inculcate into the minds of youth the words of God. He was an organizer in the church and worked untiringly at every task assigned to him. The church honored him by making him an elder, and in this office he served in a commendable way. With like earnestness he swept the floor, lighted the fires, supplied the fuel, with a zeal equal to his service at the altar and equal to the earnestness which characterized his life at the Bar and upon the Bench.

He was an outstanding student, a brilliant lawyer, a Judge of the Fourth Judicial District. A man of such characteristics was called to greater fields of activity, and so it was that Omaha and the Fourth Judicial District yielded him to the Supreme Court and to the State of Nebraska, whom he served with great ability.

His friends were legion and they mourn his death. The Courts of the State of Nebraska have suffered an irreparable loss. The legal profession has lost one of its most learned members, and the State of Nebraska one of its most respected citizens.

AMBROSE C. EPPERSON
VIRGIL L. BROWN
EDWARD F. LEARY
LEO FRIED
Omaha Bar Association
Memorial Committee

Honorable James M. Fitzgerald.

May it Please the Court:

An outstanding trait in Judge L. B. Day's character prompts me to add a personal word to our record.

I first knew L. B. Day as a law student. I was in the capacity of instructor. He was not a star, but he was a sincere, hard-working, clear-thinking student. He had a genial, frank and honest attitude that drew me to him.

I kept in touch with him as he devoted a few years to the practice of law, and later we both filed as candidates for District Judge in the Fourth District. Our friends teamed us together and we were both elected, though we had no personal tie-up.

There was a vacancy on the Bench at the time, due to the death of Judge Lee Estelle during the campaign. Governor McKelvie had announced that he would appoint the candidate elected, to fill the unexpired term, and, having had more experience than L. B., I expected the appointment. With fear and trembling I started reading the syllabi of the Nebraska reports, beginning with the last published volume.

A day or two after our election was assured, L. B. came to my office, and in our conversation he led me to think he would like the appointment. I was surprised, and I said, "Do you want that appointment?" His answer was, "Well. I have nothing to do. I have let all my business get away while I have been giving all my time to campaigning."

I was relieved on my part, but marveled at his courage in seeking to enter immediately into the duties of a District Judge. He was appointed and was assigned some very difficult and important cases to preside over. He never faltered, and presided well, as I knew he would.

The courage which he displayed at that time was characteristic of his conduct at all times, and it seems to me that courage is one of the most important qualifications of a Judge on any Bench.

L. B. Day, with all the work he performed on the Bench, never lost sight of his duty as a citizen. He gave of, what

seemed to him, surplus energy to the cause of advancing propositions of better government and better citizenship. He never allowed himself to become submerged by his work on the Court. He continually strove to elevate his profession and the standards of government and society. He was one of my very close friends and one of our very highest class citizens.

Honorable John W. Delehant.

May it Please the Court:

It is our privilege, at once honorable and melancholy, to offer public testimony of the affection and respect of the Bench and Bar of Nebraska, which his years of service, with and for us, purchased for the distinguished jurist in whose name and memory we are convened. The obvious theme of our tribute might appear, at first impression, to be his distinguished career as a Judge, first of the busy trial courts of our metropolitan city, and thereafter, until his untimely death, of this, our Supreme Court. But the permanent evidence of his judicial labors is abundantly preserved in the official reports of your Honors' opinions, as a source of pride to us, his coworkers, and of inspiration to the generations of our profession who shall follow us. For myself, as one of his brethren at the Bar, I am content simply to submit that record, free from any purposeless embellishment.

With the indulgence of the Court, I shall, therefore, presume briefly to recall some of those engaging qualities of the man that made it infinitely more natural to those of us who knew him from his youth to salute him with the familiar "LB," rather than with the more austere "Judge Day." For, able jurist that he was and that your Honors knew him to be, I need not remind you that he was also and especially a cultured and scholarly gentleman and a generous and sympathetic friend. And who will reckon judicial distinction or executive ability above those qualities of the human spirit that merit the noblest of titles, that of "friend?"

Beneath a mask of disarming geniality, L. B. Day was a maturely educated gentleman. His learning was deliberately unostentatious, but none the less authentic. In his undergraduate collegiate courses he consistently maintained a high scholastic standing. He so far mastered the classical studies of Latin, Greek and English literature that, throughout his life, they ministered both to his public career and to his enjoyment of living, and of cultured friendships. A well-selected course in philosophy trained him for the accurate apprehension of objective truth, which is, after all, the ultimate mission of genuine education.

Accordingly, when he was elevated to the Bench at an age scarcely beyond the minimum legal requirement, his nearest friends, realizing the accuracy of his basic learning, were securely confident that he would earn the respect and esteem which the citizens of Nebraska shortly accorded to him.

He was, throughout his life, a humble and practicing Christian layman. Because, if he could stay my speech, he would deter me from praising him for the performance of what he conceived to be his simple Christian duty, I shall respect what, I so surely know, would be his wish. But may I offer just this reflection. His persistent faith and its constant admonition respecting the proper place of our poor humanity in the Divine economy fostered that humility of spirit which endeared him to all of us as a friend.

And it was as a friend that each one of us knew and loved him best. His simplicity, his unfailing geniality, his acknowledged culture, his unflinching loyalty conspired through many years to assure him a warm welcome in any company of men who had come to know him, and especially among the members of our profession, both within our state, and beyond its borders.

Humanly speaking, the loss of a friend is only doubtfully reparable. The President, the Governor, the Judge may die. Another President, another Governor, another Judge will assume his duties and adequately discharge them; because, fortunately for the State, official position has a highly impersonal quality. But who shall replace a

friend? His chair may be occupied, his segment of our time consumed by others; but his hand clasp, his smile, his counsel, his encouragement, all these and the other manifestations of his spirit will not suffer substitution. Save as they linger in our memory, they die with the friend, never to be duplicated. And we would not have it otherwise.

So, in this hour, when our fellow citizens are remembering the life and service of L. B. Day, the jurist, may not some of us, many indeed, be pardoned, if we allow our recollection to dwell reverently and affectionately on the memory of L. B. Day, the cultured, scholarly gentleman, the faithful Christian, the generous, loyal and devoted friend. For to us whose intimate touch with him had its origin in the years when the man was in the making, he bore those relations above all others.

Honorable Frank D. Williams.

May it Please the Court:

L. B. Day was born February 3, 1889, Westboro, Missouri, son of Frank and Sarah Day. The family moved to Boone county, Nebraska, in 1891 and purchased a farm a few miles from the railroad station of Boone. The father was a steady, intelligent, industrious farmer and stockman. He was a pioneer in raising alfalfa, and from growing this legume, rotating crops and intensive cultivation raised his lands to the highest state of fertility. He increased his holdings to 640 acres of this fine land and farmed and raised stock on a large scale. Under these surroundings the son, L. B., learned to work and to do his share in the farming and stock-raising venture.

He attended the county schools, ultimately graduating at the Albion High School. He paid particular attention to the subject of Latin. In 1907 he entered Omaha High School, giving particular attention to the same subject. From there he entered Creighton University, where he gave special attention to Latin and Greek. He finished the

liberal arts course at the university and then entered the law college. He spent his vacations at home on the farm and his father paid the expenses of the university course. During the time he attended the law course he conducted the commercial law classes in a business college in Council Bluffs, Iowa, and attended many of his classes at the university in the evenings. On Saturdays he clerked in Omaha stores and paid his own way through the law college. It is still remembered how pleased he was when he earned his first $2.00 for an afternoon's work in a large store in Omaha. He graduated from the liberal arts course in 1911 and from the college of law in 1914.

He concluded to practice law in Omaha, and first had desk room in a lawyer's office, but soon opened his own office. He married in 1916, and in 1920 he became a candidate for District Judge in the Fourth Judicial District and was elected, and in 1924 was reelected. In 1928 he became a candidate for Supreme Judge from the Fourth District. His opponent was one of Nebraska's finest lawyers, and at the time a member of this Court, but Judge Day was elected. He entered upon his duties in this court on January 3, 1929, and was again elected to this Court without opposition. At the beginning of his membership on this Court he moved his family to Lincoln, and the family continued to reside in Lincoln until his death, November 22, 1938, in Lincoln. He left his wife and three children surviving him of his immediate family.

The peculiarity of his name—L. B.—is explained by his mother, still living. At the time of his birth his paternal grandfather wanted the babe named after him, and as a concession to the grandfather the initial letters of the grandfather's name were used and made up the name L. B. Judge Day has also perpetuated this same name in his younger son.

In his young manhood he was tall and slender, but in his more mature years he grew heavier and was a noticeable figure in any gathering.

It is generally understood that experience as well as learning and intellect are necessary aids to a successful

judicial career. The fact that Judge Day grew up on a farm on the scale it was conducted and under the tutelage of honest, intelligent parents, giving him a strong body and an honest purpose, a sympathetic understanding with that basic occupation in this agricultural state, in dealing with appeals in this Court he was therefore able to approach them with general knowledge of the surrounding circumstances in which the controversy arose. Then he was one of those individuals who grow and continue to develop.

Judge Day profited much from his fine college and university education. His opinions are expressed in plain English and well-constructed sentences. As a jurist he knew no Judge knows all the law. He could only know a relatively small part, but he also knew that with his preparation and ability he could approach with confidence in himself the work in hand. Judge Day's opinions left little doubt of what he finds the law to be. Picked at random, the following cases show positive and clear statements of the law:

In re Estate of Kajewski, 134 Neb. 485, a will contest. This case shows a prodigious amount of work. Fourteen syllabi head the opinion. In the discussion Judge Day quotes authority for almost every rule laid down. This case is helpful to the practitioner.

See, also, the case *American National Red Cross v. Young*, 133 Neb. 558.

Question: Motion for new trial on grounds of newly discovered evidence.

See, also, *Harmer v. State*, 133 Neb. 652.

Question: Applicant arrested for breaking and entering. Defense insanity. Trial judge refused to receive evidence of the findings of the insanity commission. Syllabus 1: "A judgment in another case finding a fact now in issue is ordinarily not admissible."

Today, perhaps as never before, the people look to the courts for protection. Whenever the test comes between various branches of the government, or aggrieved groups of political parties attacking the courts, the people support the courts. Perhaps in no other state do the people give so

unanimous support as they do in Nebraska. This state is almost wholly agricultural and has few agencies to sway the people from their allegiance to the courts. On their part they have an abiding faith in the integrity of the courts and in the protection which the courts afford.

To Judge Day came the last summons—to his family his loss is inestimable; and the State has lost a valuable citizen.

Honorable David A. Fitch.

May it Please the Court:

I became acquainted with Judge Day when he was a young practicing lawyer in the City of Omaha. At my first meeting with him I was very much impressed by his very pleasing personality. He was optimistic, vigorous, and refreshingly candid and frank. During the years which followed, our acquaintance grew into a very warm friendship, and my admiration and high regard increased. His personality the last time I talked to him was just as refreshing and pleasant as it was the first day I saw him.

While it is a matter of common knowledge that Judge Day fully appreciated the seriousness of his responsibilities as a District Judge and as a member of this Court, and at all times conducted himself with true dignity in the performance of his duties, he had the happy faculty of being able to remove his judicial dignity with his robe, and meeting and mingling with his friends in an unassuming and natural manner. He was never so engrossed nor so busy that he did not have time to visit with his friends and take a sincere interest in their affairs.

He was bold and fearless, and there was never any doubt as to where he stood on a proposition, and he energetically supported that which he thought was right and should be done. He had a broad understanding of human nature, and was always able to see and appreciate the rights of others, and was charitable in his opinions. He came to Omaha as a young man, without previous acquaintance or

connection, and in the comparatively short time he lived with us he acquired a host of sincere friends and admirers, and his friends included people of all walks of life, and of all creeds and color. He was not bigoted, and neither was he prejudiced. He was an honest, fearless, sincere man, who tried to the best of his ability to make this world a happier and better place in which to live.

Judge Edward F. Carter.

It has been my privilege to know Judge Day as an associate on this Court and to become acquainted with many of his good qualities that became known through that relationship. His forceful personality and character have left a definite stamp on this Court. His initiative and courage made him an outstanding leader in anything he attempted. His judicial opinions were as vigorous as his personality. In addition to the judicial contributions which his opinions have made, the legal profession in the state is indebted to him for his advocacy of high educational and moral standards of those seeking admission to the Bar. In his usual and vigorous way he strove to insure to the public a Bar whose honesty and integrity was above reproach. In his association with other members of the Court he was firm if he was sure he was right, but was always willing to investigate the foundation of his conviction. The courtesy and condescension shown by him toward those with whom he disagreed marked him as one with a truly judicial mind.

It was a loss to this court to have Judge Day taken from its membership. The reputation he made while occupying this Bench is tribute enough to the fine qualities of which this Court has been deprived.

Robert G. Simmons, Chief Justice.

The resolutions offered this morning are adopted by the Court. The resolutions, together with the statements of counsel, will be extended at length on the journal and printed in the official reports of this Court. Mrs. Day and the family will be advised of the high regard of the Bench and the Bar for Justice Day, and of the expressions of sympathy made this day. Copies of the resolution will be sent to them.

TABLE OF CASES REPORTED

Abts, Richards v. 347
Acton, City of Scottsbluff v. 636
American Loan Plan v. Frazell 718
Anderson, First Trust Co. v. 397

Bank of Roca v. Meyer 128
Banner County, Miller v. 549
Barnard v. Heather 513
Barth v. Reber 25
Batterman, Laux v. 386
Benson, Rasmussen v. 232
Berggren, Linch v. 530
Beskas v. Calkins 323
Bleckwehl, Schultz v. 94
Blochowitz, Geistlinger v. 163
Blochowitz, In re Guardianship of 163
Bloedorn, In re Estate of 261
Bonner v. Pszanowski 196
Bowker, Swan v. 405
Bowman v. Caldwell 554
Brandeis & Son, Rankin v. 86
Brill v. Weitzel 43
Butler, Horbach v. 394

Caldwell, Bowman v. 554
Caldwell, Olson v. 557
Calkins, Beskas v. 323
Carlson v. Carlson 569
Carlson v. Condon-Kiewit Co. 587
Central States Electric Co., Ludwickson v. 371
Chicago Lumber Co., Lowe v. 735
Chilen v. Commercial Casualty Ins. Co. 619
Chmelka, Thurston County v. 342
City of Grand Island, Hayman v. 873
City of McCook v. Johnson 270
City of Nebraska City, James Poultry Co. v. 787
City of Scottsbluff v. Acton 636
Clarke, Nesmith v. 117
Commercial Casualty Ins. Co., Chilen v. 619

Condon Co. v. Loup River Public Power District 284
Condon-Kiewit Co., Carlson v. 587
Conkey v. Knudsen 890
Coryell & Son, Watenpaugh v. 607
Craig v. Seebecker 221
Cross v. Theobald 199

Dakota County, Hansen v. 582
Dalton State Bank v. Eckert 500
Dania Old People's Home, Dannebrog Lodge v. 602
Dannebrog Lodge v. Dania Old People's Home 602
Dargaczewski, Diehm v. 251
Dederman v. Summers 453
Deer, Haley v. 459
Denison v. Omaha & C. B. Street R. Co. 307
Department of Banking v. Flotree 416
Department of Banking v. Hall 191
Diehm v. Dargaczewski 251
Domestic Industries, Zelen v. 456
Douglas County, Gate City Co. v. 531
Dudek, Kenfield v. 574
Dugan, Rich v. 63
Dunn v. Mutual Benefit Health & Accident Ass'n 506
Dutiel v. State 811

Eaton v. Merritt 363
Eckert, Dalton State Bank v. 500
Edwards v. York 712
Effenberger v. Marconnit 558
Effenberger, Marconnit v. 564
Eisenhauer v. Otoe County 818
Enterprise Irrigation District v. Willis 827
Equitable Life Assurance Society v. Person 800
Equitable Life Assurance Society, Wert v. 654

Farmers & Bankers Life Ins. Co. v. Mathers 757
Farmers Irrigation District, Ledingham v. 276
Farmers State Bank of Millard, Labs v. 130
Farmers Union Livestock Commission v. Union P. R. Co. 689
Federal Farm Mtg. Corporation v. Mulder 133
Federal Land Bank v. Worley 493
Filley v. Mancuso 403
First Trust Co. v. Anderson 397
First Trust Co. v. Maryott 679
Flotree, Department of Banking v. 416
Fox, Sweley v. 780
Frazell, American Loan Plan v. 718

Freadrich, Goodwin v. 203
Fruit Dispatch Co., Moise v. 684
Fundum, Thomas v. 728

Gallagher v. Law 381
Gate City Co. v. Douglas County 531
Geiger, Hoffman v. 349
Geistlinger v. Blochowitz 163
German Congregational Church of Zion, Tyler v. 667
Gettman, Henderson v. 613
Glenwood Telephone Co., Sheets v. 56
Globe Indemnity Co. v. Thayer County Bank 484
Good, Independent Lubricating Co. v. 171
Goodman v. O'Grady 612
Goodwin v. Freadrich 203
Graham v. Graham 761
Grand Island, City of, Hayman v. 873
Greenwald v. Omaha & C. B. Street R. Co. 183

Haines v. State 433
Haley v. Deer 459
Hall, Department of Banking v. 191
Hall v. State 188
Hamilton County Farmers Telephone Ass'n, McCall v. 70
Hansen v. Dakota County 582
Hansen v. Paxton & Vierling Iron Works 867
Hayman v. City of Grand Island 873
Heather, Barnard v. 513
Heckendorn, Mills v. 294
Heinisch v. Travelers Mutual Casualty Co. 13
Helgenberger v. Ristau 889
Henderson v. Gettman 613
Hering, Ritter v. 1
Hiestand v. Ristau 881
Hild v. Hild 896
Hoffman v. Geiger 349
Hoganson, Luikart v. 280
Holferty v. Wortman 732
Home Mutual Ins. Ass'n, Ware v. 329
Home Owners' Loan Corporation v. Smith 618
Hopper v. Koenigstein 837
Horbach v. Butler 394
Huff, Shramek v. 178

Independent Lubricating Co. v. Good 171
In re Application of Tyler 667
In re Estate of Bloedorn 261

In re Estate of Jensen 602
In re Estate of Lehman 592
In re Estate of Nielsen 110
In re Estate of Skade 712
In re Estate of Vohland 77
In re Estate of Weitzel 43
In re Guardianship of Blochowitz 163

James Poultry Co. v. City of Nebraska City 787
Jensen, In re Estate of 602
Johnson, City of McCook v. 270
Jurgensen, State v. 136
Jurgensen v. State 537

Kansas City Life Ins. Co. v. Neverve 630
Kelly, Windle v. 143
Kenfield v. Dudek 574
Kirk v. Vohland 77
Klapka v. Shrauger 354
Knudsen, Conkey v. 890
Kochenthal, Present v. 592
Koenigstein, Hopper v. 837
Kuwitzky v. O'Grady 466

Labs v. Farmers State Bank 130
Lamb v. Sandall 300
Langan v. Langan 229
Laux v. Batterman 386
Law, Gallagher v. 381
Ledingham v. Farmers Irrigation District 276
Lehman, In re Estate of 592
Linch v. Berggren 530
Loup River Public Power District, Condon Co. v. 284
Loup River Public Power District v. Platte County 21
Lowe v. Chicago Lumber Co. 735
Ludwickson v. Central States Electric Co. 371
Luikart v. Hoganson 280

McCall v. Hamilton County Farmers Telephone Ass'n 70
McCook, City of, v. Johnson 270
McDonald v. Masonic Temple Craft 48
McDonald v. Richardson County 150
McIlwain v. McIlwain 705
Mancuso, Filley v. 403
Marconnit, Effenberger v. 558
Marconnit v. Effenberger 564
Maryott, First Trust Co. v. 679

Mason v. Reynolds 773
Masonic Temple Craft, McDonald v. 48
Mathers, Farmers & Bankers Life Ins. Co. v. 757
Mayhew, Western Union Life Ins. Co. v. 6
Melville Lumber Co. v. Scott 379
Merritt, Eaton v. 363
Metropolitan Life Ins. Co. v. Suverkrubbe 865
Meyer, Bank of Roca v. 128
Meyer v. Schmidt 850
Micek v. Omaha Steel Works 449
Miller v. Banner County 549
Miller, Millett v. 123
Millett v. Miller 123
Mills v. Heckendorn 294
Moise v. Fruit Dispatch Co. 684
Moore v. Washington National Ins. Co. 29
Mulder, Federal Farm Mtg. Corporation v. 133
Mutual Benefit Health & Accident Ass'n, Dunn v. 506

National Life & Accident Ins. Co., Wolski v. 643
Nebraska City, City of, James Poultry Co. v. 787
Nelson v. Rosenberg 34
Nesmith v. Clarke 117
Neverve, Kansas City Life Ins. Co. v. 630
Nielsen, In re Estate of 110
Nielsen v. Nielsen 110
North, Orchard & Wilhelm Co. v. 39
Nuernberger, Prudential Ins. Co. v. 743

O'Grady, Goodman v. 612
O'Grady, Kuwitzky v. 466
Olson v. Caldwell 557
Omaha & C. B. Street R. Co., Denison v. 307
Omaha & C. B. Street R. Co., Greenwald v. 183
Omaha Steel Works, Micek v. 449
Orchard & Wilhelm Co. v. North 39
Otoe County, Eisenhauer v. 818

Paege v. Schmoldt 261
Pantel Realty Co., Winterson v. 472
Paxton & Vierling Iron Works, Hansen v. 867
Person, Equitable Life Assurance Society v. 800
Phillips v. Phillips 313
Picard v. Steinacher 723
Platte County, Loup River Public Power District v. 21
Platte Valley Public Power and Irrigation District, Welsh v. 441
Plum v. Siekmann 101

Present v. Kochenthal 592
Prichard v. State 522
Prudential Ins. Co. v. Nuernberger 743
Pszanowski, Bonner v. 196

Rankin v. J. L. Brandeis & Son 86
Rasmussen v. Benson 232
Reber, Barth v. 25
Refrigeration Discount Corporation v. Richards 856
Reynolds, Mason v. 773
Rich v. Dugan 63
Richards v. Abts 347
Richards, Refrigeration Discount Corporation v. 856
Richardson County, McDonald v. 150
Ristau, Helgenberger v. 889
Ristau, Hiestand v. 881
Ritter v. Hering 1
Rosenberg, Nelson v. 34
Ruback, State v. 335

Sandall, Lamb v. 300
Schmidt, Meyer v. 850
Schmoldt, Paege v. 261
Schultz v. Bleckwehl 94
Scott, Melville Lumber Co. v. 379
Scottsbluff, City of, v. Acton 636
Seebecker, Craig v. 221
Shea v. Shierman 862
Sheets v. Glenwood Telephone Co. 56
Shierman, Shea v. 862
Shramek v. Huff 178
Shrauger, Klapka v. 354
Siekmann, Plum v. 101
Skade, In re Estate of 712
Smith, Home Owners' Loan Corporation v. 618
Smith, State v. 423
Smith, Weir v. 447
South Omaha State Bank, State v. 478
State, Dutiel v. 811
State, Haines v. 433
State, Hall v. 188
State, Jurgensen v. 537
State, Prichard v. 522
State v. Smith 423
State, Turpin v. 389
State, White v. 154
State, ex rel. English, v. Ruback 335

State, ex rel. Hunter, v. Jurgensen 136
State, ex rel. Sorensen, v. South Omaha State Bank 478
Steinacher, Picard v. 723
Summers, Dederman v. 453
Sutton v. Wood 120
Suverkrubbe, Metropolitan Life Ins. Co. v. 865
Swan v. Bowker 405
Sweley v. Fox 780

Thayer County Bank, Globe Indemnity Co. v. 484
Theobald, Cross v. 199
Thomas v. Fundum 728
Thurston County v. Chmelka 342
Travelers Mutual Casualty Co., Heinisch v. 13
Turpin v. State 389
Tway v. Tway 266
Tyler v. German Congregational Church of Zion 667
Tyler, In re Application of 667

Union P. R. Co., Farmers Union Livestock Commission v. 689

Vohland, In re Estate of 77
Vohland, Kirk v. 77

Ware v. Home Mutual Ins. Ass'n 329
Washington National Ins. Co., Moore v. 29
Watenpaugh v. L. L. Coryell & Son 607
Weir v. Smith 447
Weitzel, Brill v. 43
Weitzel, In re Estate of 43
Welsh v. Platte Valley Public Power and Irrigation District 441
Wert v. Equitable Life Assurance Society 654
Western Union Life Ins. Co. v. Mayhew 6
White v. State 154
Willis, Enterprise Irrigation District v. 827
Willis, Winters Creek Canal Co. v. 825
Windle v. Kelly 143
Winters Creek Canal Co. v. Willis 825
Winterson v. Pantel Realty Co. 472
Wolski v. National Life & Accident Ins. Co. 643
Wood, Sutton v. 120
Worley, Federal Land Bank v. 493
Wortman, Holferty v. 732

York, Edwards v. 712

Zelen v. Domestic Industries 456

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1938

PAUL RITTER, APPELLEE, V. STRUVE P. HERING ET AL., APPELLANTS.

280 N. W. 231

FILED JUNE 15, 1938. No. 30358.

1. **Automobiles:** ACTION FOR DAMAGES: CONTRIBUTORY NEGLIGENCE: DIRECTION OF VERDICT. Where the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the duty of the court to direct a verdict for the defendant.
2. **Appeal.** "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed and dismissed.*

Chambers, Holland & Locke, for appellants.

Charles A. Dafoe and *Jessen & Dierks, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

GOSS, C. J.

Plaintiff had a verdict and judgment against both defendants for $4,000 for damages for personal injuries and injuries to his car received in an automobile collision, from which they appealed.

Plaintiff alleged that he was the owner of the car he was driving, and in two causes of action asks for damages for personal injuries and for his hospital and medical expenses in one and for damages to his car in the other.

Defendants filed a joint answer and incorporated therein the cross-petition of Cecil W. Means, the owner of the automobile, driven by defendant Struve P. Hering, for damages suffered to his car.

Each party artfully alleged the facts and charged negligence of the driver of the other car. We do not deem it necessary to state further the pleadings. The situation can be readily understood from the statement of the evidence.

The evidence shows that the collision occurred at the intersection of state highway No. 2 and graveled state highway No. 43, at a point about three-quarters of a mile west of the Palmyra corner in Otoe county. The former is an oil mat road running east and west and the latter starts near Eagle and goes south to the point named and ends there.

Plaintiff, aged 39, a farmer near Cook, Nebraska, had taken his family and some relatives to the state fair on September 10, 1936. The collision occurred on a clear, dry day, at or before 6:30 in the afternoon, at the instant plaintiff drove from No. 43 onto No. 2, intending to proceed east on the pavement. The graveled highway widens out at the intersection so as to allow cars entering or leaving the gravel to do so on a curve. This curve for cars turning east is permissibly larger because there is a filling station at the northeast corner and its grounds are graveled and entered into No. 43. There is a highway stop sign at the west side of No. 43, facing traffic from the north near No. 2, admonishing those entering the latter to stop. There is (as we think may be said to be the conventional practice) no stop sign on the east side of No. 43. There are no stop signs on No. 2, but there are "slow" signs on that highway in the vicinity, admonishing drivers to slow their speed.

Plaintiff testified that, as he was approaching No. 2, and about 200 feet north of a sign "State Highway 200 feet,"

he saw defendants' car about a quarter of a mile east of the intersection coming at a rapid rate of speed, which the witness estimated at 60 miles an hour. The vision of defendants' car was obscured by the filling station as the witness got nearer his turn, and he also testified that he was looking for cars from the west; he slowed down to about 20 miles an hour, the Hering car did not slacken speed, plaintiff applied his brakes and tried to stop "about twenty-five or thirty feet north of the black top." From the testimony of plaintiff, including his marks as to the location of his front wheels, the front of his car was on the north side of the pavement on which defendants' car was going west at the time of the collision. He "was always under the impression" plaintiff's car had stopped before defendants' car hit it. While he seeks to qualify his position by saying that the black top extended over into the gravel of No. 43, it is very apparent from the marks he made on the picture in evidence that the front of his car was over on No. 2 pavement before he stopped. He testified that he never saw the stop sign that guards No. 2 from the traffic that comes in from No. 43.

Others testified to the facts when the collision occurred, but they do not materially change the situation from that given by plaintiff.

At the end of plaintiff's case defendants moved for a directed verdict because the evidence showed that the contributory negligence of plaintiff was more than slight. A similar motion was made at the close of all the evidence; both motions were overruled.

The verdict was returned October 7, 1937, and judgment immediately entered upon it. The next day defendants filed a paper in the case stating on its face, opposite the title, that it was a "Motion for Judgment Notwithstanding Verdict and Motion for New Trial." The preliminary paragraph of the motion omits to state that it is a motion for a new trial, and says in substance that defendants move for an order vacating the verdict and judgment and that the court enter judgment for defendants notwithstanding the

verdict for the following reasons: Then follow 42 paragraphs numbered with Roman numerals setting forth the reasons. In two succeeding journal entries the trial court referred to this pleading as "a motion for judgment notwithstanding the verdict and an alleged motion for a new trial." In the last of these orders the trial court overruled the motion, and defendants gave notice of appeal on that day, January 4, 1938.

The motion contained all the matter necessary for a motion for a new trial except that the first paragraph did not state that it was such. However, as heretofore stated, the title of the motion gave notice that it was intended to include that phase in the motion. This was, at most, a technical error or defect which the trial court might have allowed to be amended, and which defendants requested to do by making the body of the motion include the words "or grant a new trial for the following reasons:" That amendment seemed to be in furtherance of justice, as provided in section 20-852, Comp. St. 1929. But, notwithstanding the motion was overruled by the trial court, there is the following statute which justifies relief to defendants in this court upon the record as it was left after the refusal of the trial court: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.

The title of the motion on its face stated that it was a motion for judgment notwithstanding the verdict *and* motion for a new trial. The substance of the motion was applicable to both. The failure to state further in the literary composition of the motion was at most a defect in the proceedings, a correction of which, even if it were needed, affects no substantial rights of plaintiff. We are of the opinion that so to rule is in the interests of "the furtherance of justice," and that the district court might well have allowed the motion to be amended, as requested. We fail to

find from the record that the court did not overrule the motion both as one for a new trial and as one for judgment notwithstanding the verdict.

Plaintiff should have known that the paved highway he was approaching on a graveled highway was what is usually called an "arterial" and that those driving automobiles on it had what is generally termed the right of way. Not that such a right of way is absolute, but that it is the usual and customary rule protecting such highways from entry of automobiles from an inferior or subsidiary highway without stopping. If he had looked with care he would have seen the stop sign at the right of the graveled highway on which he was traveling. He testified that he has never yet seen it. He stated that he thought he had to look to the west for drivers coming from his right and that he himself had the right of way over one coming from the east or from his left on the pavement. The physical facts as well as his own testimony show that he had entered upon the pavement and was struck before he stopped or a very short instant thereafter. Not excusing the negligence of defendants, this action on the part of plaintiff, in our opinion, was more than slight negligence.

The leading case in this state was a decision written by Chief Justice Morrissey, setting out the form of an instruction on comparison of negligence. It was for damages for injuries in an automobile accident. *Morrison v. Scotts Bluff County,* 104 Neb. 254, 177 N. W. 158. This case has been followed by many others, among them *Nelson v. Plautz,* 130 Neb. 641, 265 N. W. 885, and *Kudrna v. Sarpy County,* 125 Neb. 83, 249 N. W. 87. From these and many other cases which might be cited we deduce this rule: Where the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the duty of the court to direct a verdict for the defendant.

The judgment of the district court is reversed and the action is dismissed.

REVERSED AND DISMISSED.

WESTERN UNION LIFE INSURANCE COMPANY, APPELLANT, V. THOMAS C. MAYHEW ET AL., APPELLEES.
280 N. W. 250

FILED JUNE 15, 1938. No. 30298.

1. **Bills and Notes:** BONA FIDE PURCHASERS. A transferee of unmatured negotiable paper, purchased by him from the payee who procured it from the maker by fraud without consideration, is not a *bona fide* purchaser, if he had knowledge of such facts and circumstances as proved that he took the paper in bad faith, though he testified he had no actual notice or knowledge of the fraud.
2. **Principal and Agent.** "A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose." *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275.
3. **Bills and Notes.** Bad faith in the purchase of unmatured negotiable paper fraudulently procured by payee from the maker without consideration may be established by circumstantial evidence.

APPEAL from the district court for Cherry county: EARL L. MEYER, JUDGE. *Affirmed.*

Ginsburg & Ginsburg, for appellant.

Lawrence W. Rice, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a suit in equity to foreclose on land in Cherry county a mortgage securing a note for $1,000 and interest. The loan was for the term of four years, or until August 30, 1939, with interest payable semiannually, as evidenced by eight coupons, each for $30. Thomas C. Mayhew, defendant, executed the note, mortgage and coupons August 30, 1935. They were payable to Owen McGinty, who, August 30, 1935, assigned them to the Western Union Life Insurance Company, plaintiff. Defendant did not pay interest due March 1, 1936, nor taxes for 1935. Pursuant to terms of

the mortgage, plaintiff, on account of the defaults, declared the entire debt due. The petition is sufficient to support a decree of foreclosure.

Defendant pleaded in his answer that he negotiated with plaintiff and its agents for a 100-dollar loan only; that by fraud, deceit and misrepresentation upon which he relied he was induced by them to sign the instruments described in the petition, when he had no glasses at hand, could not see to read and did not know what he was signing; that the papers were not read to him; that he was not told the principal debt stated in the mortgage was $1,000; that he received no consideration except $100 and $77 paid for taxes. He offered to refund what he had received.

In a reply plaintiff denied all fraud attributed to it in the answer and pleaded it made the purchases in good faith before maturity of the paper, for full value and consideration, without any notice or knowledge of any fraud or other defense of any kind.

Upon a trial of the cause the district court found that defendant had received for the 1,000-dollar mortgage only $125 in cash and $77 in the form of taxes paid for him and that these items with unpaid interest thereon amounted to $225.62. A decree of foreclosure therefor followed. To satisfy the decree defendant deposited with the clerk of the district court $317.55 which plaintiff declined to accept. On appeal by plaintiff, the cause was presented for trial *de novo*.

There was fraud in the inception of the note, mortgage and interest coupons and Owen McGinty, payee named therein, was an active perpetrator thereof. He procured the signature of Thomas C. Mayhew, maker, defendant, to the executed note and the 1,000-dollar mortgage. The maker received a check for $100 and in addition $25 in cash and $77 for taxes. Otherwise, there was no consideration. A formal assignment of the mortgage by McGinty to plaintiff for 67 shares of its capital stock is dated August 30, 1935. The note and interest coupons were indorsed by him to plaintiff without recourse. These facts are clearly shown

by the evidence. The burden, therefore, was on plaintiff to prove that it purchased the unmatured paper in good faith for value without notice or knowledge of fraud or of other defense or infirmity.

The question presented by the appeal is: Did plaintiff prove that it did not participate in the fraud, did not have notice or knowledge of it or of such facts and circumstances as proved bad faith? Comp. St. 1929, secs. 62-402 to 62-406; *Witte v. Broz,* 113 Neb. 168, 202 N. W. 411; *Auld v. Walker,* 107 Neb. 676, 186 N. W. 1008; *People's Trust & Savings Bank v. Rork,* 96 Neb. 415, 148 N. W. 95; *Central Nat. Bank v. Ericson,* 92 Neb. 396, 138 N. W. 563.

Several persons shared the fruits of the fraud. All of them were interested in proving good faith of plaintiff in buying the note and mortgage; in proving want of notice or knowledge of the initial fraud; in proving innocence in all negotiations leading to the transfer from payee to plaintiff and sufficiency of 67 shares of its capital stock as consideration for the assignment of the 1,000-dollar mortgage. In addition to plaintiff the persons interested in cutting off the defense of the defrauded maker of the paper are James W. Bachman, Frank H. Hoagland, Harry H. Haffner and Owen McGinty. McGinty excepted, each testified positively that he had no notice or knowledge of any fraud perpetrated upon Mayhew who signed the tainted instruments. The import of what they said on the witness-stand was that each was entirely ignorant of the fraud and acted in good faith in relation to the transfer of the paper from McGinty to plaintiff. They evinced a purpose to close every conduit through which the taint might reach Bachman or plaintiff. The testimony of each shows on its face bias prompted by self-interest. Accepting as verity, however, direct oral testimony that all who participated in or profited by the transfer, with the exceptions of McGinty and Mayhew, were without any actual knowledge of the preliminary fraud, the issue is not necessarily determined in favor of plaintiff. Evidential facts and circumstances showing bad faith may be more potent than oral testimony of interested persons to

the contrary. The statutes and cases already cited show that bad faith in the taking of fraudulent negotiable notes may be shown by circumstances. Emerson taught:

"Commit a crime, and it seems as if a coat of snow fell on the ground, such as reveals in the woods the track of every partridge and fox and squirrel and mole. You cannot recall the spoken word, you cannot wipe out the foot track, you cannot draw up the ladder, so as to leave no inlet or clew."

The truth in civil cases involving fraud and deceit may be discovered sometimes by the force of circumstances. In the case of *Arnd v. Aylesworth*, 145 Ia. 185, 123 N. W. 1000, the supreme court of Iowa said:

"It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law." Adopted in *Central Nat. Bank v. Ericson*, 92 Neb. 396, 138 N. W. 563, and *Auld v. Walker*, 107 Neb. 676, 186 N. W. 1008.

Bachman was president of plaintiff and was active for several days in negotiating an exchange of insurance com-

pany stock for the note and mortgage. In writing, under date of April 2, 1935, he appointed Hoagland an agent to solicit applications for life insurance and notified him by letter September 9, 1935, that plaintiff was then selling nonparticipating life insurance, inclosing a table showing the commissions of agents. Haffner was also a soliciting agent of plaintiff when the note and mortgage were executed and delivered. These agents of plaintiff officed together in Norfolk, Nebraska, the residence of McGinty and Mayhew. The latter, according to a preponderance of the evidence, was then a feeble man, 84 years of age, who had been childish and unable to work for 15 years. Bachman, Hoagland and Haffner knew that McGinty and Mayhew wanted some money. Plaintiff paid none for the mortgage.

The evidence tends to prove the following facts: Bachman and Hoagland had three conversations in regard to the purchasing of the paper. Hoagland came from Norfolk to the insurance office in Lincoln and told Bachman he had a party who had a 1,000-dollar mortgage to exchange for stock, but mortgagor had to have $300 in money. Hoagland was told to bring the abstract and mortgage and that the exchange would be made if the security proved sufficient, but no cash would be paid. The next conversation occurred about August 18, 1935, when Hoagland returned with a 1,000-dollar mortgage from Mayhew to McGinty and was told it would have to be exchanged for a mortgage in a form adopted by plaintiff and saying McGinty would be willing to take a thousand dollars in stock. The third conversation took place at Lincoln about September 4, 1935. Bachman then had the mortgage in suit, said he would have it recorded and the abstract examined and, if approved by counsel, he would close the deal.

Bachman himself testified that plaintiff issued to McGinty 67 shares of capital stock of the actual value of $10 a share and of the book value of $15 a share. Asked directly how the transaction appeared on the books of accounting, he answered:

"The ledger shows that we received a mortgage for $1,000

and $5 in currency, or $1,005. Now the par value of $500 was set up as capital stock and the balance was set up as contributed surplus."

Notwithstanding what the books thus showed, Bachman testified the par value of the 67 shares was $10 a share and the book value $15 a share. Haffner testified by deposition as a witness for plaintiff, saying in substance on direct and cross-examination: Heard Hoagland tell McGinty stock would be worth $30 in 30 days; heard them talking about procuring the mortgage, Hoagland saying he could sell it, if McGinty could get it from Mayhew; McGinty said he could get a mortgage from the old man who wanted $200 and was told to "go get it if he could, because that would be one way to get his money;" was present when Mayhew signed the mortgage; heard nothing said about how much money Mayhew was to get, except the post-dated check of Haffner himself to Mayhew for $100, bearing on its face "For Final Payment of Mc.," describing the mortgaged land, being then a no-fund check but the one subsequently paid.

Bachman, instead of issuing 67 shares of stock to McGinty in one certificate, issued three certificates, one for 47 shares, another for 10 shares and the third for 10 shares. The certificates bore on their face "Shares $10 each" and were dated September 10, 1935. McGinty gave a separate receipt, witnessed by Haffner, for each certificate. There is evidence that the stock was sent by mail to Hoagland at Norfolk when he and Haffner were authorized soliciting insurance agents of plaintiff officing together. Each of them was active in procuring the mortgage for plaintiff in exchange for stock. Each acquired part of the stock issued to McGinty. Haffner testified he got a portion of the commission which plaintiff paid to Hoagland. It would be taxing credulity too far to find that either was ignorant of the initial fraud under the circumstances.

Bachman, however, testified in effect that neither Hoagland nor Haffner had authority, as agent to solicit applications for insurance, to exchange plaintiff's stock for mort-

gages, and that he and plaintiff had no actual notice or knowledge of McGinty's fraud in procuring from Mayhew the negotiable paper purchased. This oral evidence in the attempt to maintain the burden of proof on the issue of good faith is refuted by the circumstances and by the testimony of Bachman himself. It shows that, after the first mortgage in unsatisfactory form had been presented to him and rejected, he directed Hoagland to get instead a mortgage in the form required by plaintiff, a form which Bachman supplied. This service was performed by Hoagland assisted by Haffner who saw that Mayhew signed the satisfactory form and gave Haffner's own check "For Final Payment of Mc." Bachman testified that plaintiff paid no money for the mortgage except a commission of $150.75 to Hoagland. In addition Hoagland got part of the stock. The truth of the record, therefore, is that Hoagland was an active agent of plaintiff in the procuring of the mortgage in suit and in the transferring of it from McGinty to plaintiff. The following principle of law runs through a long line of decisions:

"A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose." *Dresher v. Becker,* 88 Neb. 619, 130 N. W. 275. See, also, *McKeighan v. Hopkins,* 19 Neb. 33, 26 N. W. 614; *Joslin v. Miller,* 14 Neb. 91, 15 N. W. 214; *Tylee v. Illinois C. R. Co.,* 97 Neb. 646, 150 N. W. 1015; *Jacobson v. Skinner Packing Co.,* 118 Neb. 711, 226 N. W. 321; *Dickinson v. Lawson,* 125 Neb. 646, 251 N. W. 656.

The circumstances were such as should have prompted Bachman to look into the consideration for the mortgage. He was president of plaintiff, an insurance corporation, and bore to it and its stockholders a fiduciary relation. *Howell v. Poff,* 122 Neb. 793, 241 N. W. 548. His duties required the care and skill essential to that relation and to the business of the insurance company. He knew before he bought the mortgage that both mortgagor and mortgagee wanted money. He refused to offer or pay any money.

Why should a 1,000-dollar first mortgage, accepted as it was at its face value, be exchanged for plaintiff's 67 shares of the recited face value of $10 a share or $670? What prompted mortgagee to make a transfer on such terms? When he could not get in the exchange $200 in money, why should he contribute $500 to the surplus of plaintiff as evidenced by its books? What was wrong with the mortgage? Why was the mortgagee willing to sell it so cheaply? These timely questions propounded themselves in the negotiations and transactions. Ordinary business sense and responsibility directed attention to them. The pertinent legislative and judicial standard of business rectitude is that a transferee of unmatured negotiable paper, purchased by him from the payee who procured it from the maker by fraud without consideration, is not a *bona fide* purchaser, if he had knowledge of such facts and circumstances as proved he took the paper in bad faith, though he testified he had no actual notice or knowledge of the fraud. Comp. St. 1929, sec. 62-406; *Auld v. Walker*, 107 Neb. 676, 186 N. W. 1008.

On a critical examination of all the evidence, the conclusion is that plaintiff did not sustain the burden of proving it purchased the note and mortgage in good faith. The preponderance of the evidence proved bad faith as properly found by the district court.

AFFIRMED.

FRANK HEINISCH, APPELLEE, V. TRAVELERS MUTUAL CASUALTY COMPANY, APPELLANT.
280 N. W. 234

FILED JUNE 15, 1938. No. 30255.

1. **Appeal.** In an action where no præcipe on appeal has been filed in this court, and where a defendant in the district court, against whom a final judgment has been there entered, has given no notice of appeal, and in behalf of whom has been filed neither an approved supersedeas bond as prescribed by section 20-1916, Comp. St. 1929, nor a cost bond in the sum of $75 as provided by section 20-1914, Comp. St. 1929, nor a

cash deposit made in lieu thereof, the filing of a transcript on appeal by a codefendant does not confer the rights of an appellant on the defendant first named or vest this court with jurisdiction to review in his behalf the judgment so entered.

2. ———: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223, 193 N. W. 267.
3. **Attorney and Client.** "An attorney may have a lien upon the claim of his client in an action for personal injury." *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281.
4. ———. Under the facts in this record, the Travelers Mutual Casualty Company was chargeable with actual knowledge of the existence of plaintiff's attorney's lien at and prior to the time it settled with plaintiff's client.
5. ———. After an attorney's lien has attached, the party adverse to his client cannot, if he has notice or knowledge thereof, destroy it by a voluntary settlement made without consent or knowledge of the attorney without rendering himself liable for the value of the lien.
6. ———. Evidence in the record examined, and *held* to support the judgment, and also to support the action of the trial court in withdrawing from the jury further consideration of the case at the close of all the evidence.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Johnsen, Gross & Crawford, for appellant.

John A. McKenzie, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a proceeding in the district court for Douglas county to secure a recovery for violations of rights declared and conferred by section 7-108, Comp. St. 1929. A jury was impaneled and sworn. Evidence was introduced in behalf of all parties. At the conclusion of the testimony, the district judge, on his own motion, discharged the jury, and, after argument of counsel, entered findings and judg-

ment that the plaintiff have and recover from the defendants, Travelers Mutual Casualty Company and Safeway Cabs, Inc., a corporation, the sum of $470.60, with costs of suit. The "defendants and each of them" thereupon filed motion for a new trial, and from the order of the trial court entered on May 8, 1937, overruling such motion, the Travelers Mutual Casualty Company alone gave notice of appeal. On May 28, 1937, a supersedeas bond in the sum of $1,000 was executed and filed by the Travelers Mutual Casualty Company alone, in its own behalf, conditioned that it "shall prosecute its appeal to effect and without unnecessary delay and that said appellant, if judgment be adjudged against it on the appeal, will satisfy such judgment and costs." This bond was duly approved, and in due time a duly certified transcript on appeal was filed.

The defendant Safeway Cabs, Inc., has given no notice of appeal, and has filed neither a supersedeas bond, prescribed by section 20-1916, Comp. St. 1929, nor the cost bond or undertaking in the sum of $75 required by section 20-1914, Comp. St. 1929, nor has a cash deposit in lieu of this bond been made in its behalf.

The statutory requirement as to appeal bonds is mandatory, and without compliance therewith this court is without jurisdiction, and an appeal will not be allowed. Comp. St. 1929, sec. 20-1914. See, *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278; *Paper v. Galbreth,* 123 Neb. 841, 244 N. W. 896; *In re Estate of Raymond,* 124 Neb. 125, 245 N. W. 442.

It also appears that "appellant's brief day" has been thrice extended by stipulation in writing executed in behalf of the Travelers Mutual Casualty Company only.

It is obvious that the Safeway Cabs, Inc., has not appealed, and is not entitled to any of the rights of an appellant in this court.

Rule 7 of this court provides: "The party or parties appealing shall file with the transcript a præcipe which shall state * * * the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing and desig-

nate all others made parties to the appeal as appellees." This rule was not complied with in the instant case, no præcipe whatever being filed, and the Safeway Cabs, Inc., who is not an appellant, is not before us as an appellee. The form of the judgment against the Travelers Mutual Casualty Company and the Safeway Cabs, Inc., we have hereinbefore set forth.

In this connection, the established rule of procedure in this jurisdiction, is: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223, 193 N. W. 267. See, also, *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114; *Bliss v. Farmers Grain & Stock Co.,* 127 Neb. 147, 254 N. W. 725.

It is obvious that the judgment not having been appealed from by the Safeway Cabs, Inc., and it not having been made an appellee herein, as to it such judgment is not subject to modification or reversal. The question as to whether the appeal is properly pending as to the Travelers Mutual Casualty Company, in view of the absence of necessary parties, there being no motion to dismiss in the record, we will reserve for the present.

On the merits of the appeal, the Travelers Mutual Casualty Company, at the time of the transaction in suit, was the insurance carrier for Safeway Cabs, Inc., a corporation. On December 26, 1933, one Moorer, a colored man, was struck at a street crossing in the city of Omaha by one of the taxicabs of the defendant Safeway Cabs, Inc. Moorer was taken to a hospital by the driver of this cab. Plaintiff herein, an attorney at law, was called to the hospital by the injured man, and, associated with attorney John A. McKenzie, was employed by Moorer to commence and prosecute an action for damages received in the accident. A written contract evidencing this employment was properly subscribed and is in the record. Thereupon a petition was drawn and verified by Moorer and immediately filed in the district court for Douglas county on December 28, 1933.

At the same time a written "attorney's lien," setting forth in apt language the claims of plaintiff's attorneys, as required by section 7-108, Comp. St. 1929, was filed in the cause and thereafter remained as part thereof. Two days later the deposition of Arthur H. Muller, the driver of the cab inflicting the injury, was taken on notice served by plaintiff in behalf of Moorer. At the taking of this deposition, Gerald M. Vasak, an attorney, employed and paid for that purpose by the Travelers Mutual Casualty Company, appeared on behalf of the defendants. On January 29, 1934, a motion was filed in such case in the district court for Douglas county, attacking the petition, which is subscribed by Gerald M. Vasak and John D. Lynch, both of whom were employed by the insurance carrier. Lynch also appears in the record as "vice-president" of Travelers Mutual Casualty Company, and as its "general counsel."

It also appears in the record that, when plaintiff was calling upon his client in the hospital, he found Mr. Schafer, claim agent for the Travelers Mutual Casualty Company, and John D. Lynch, its vice-president and general counsel, conferring with Moorer. In reply to his remonstrance against this conduct, "Mr. Lynch said that they were just out there to see if Mr. Moorer was getting along all right, and gave him a carton of cigarettes." Shortly thereafter, by a letter dated January 10, 1934, written in lead-pencil, paragraphed, and of excellent composition and form (until the writer thereof had occasion to affix his name), Moorer advises each of his employed attorneys "that I do not desire that you act as my attorney," etc., and, "I do not recall that I ever signed any papers to employ you." The uncontradicted evidence in the record is that Moorer subsequently repudiated these two letters. However, on February 5, 1934, in company with another attorney, Moorer appeared before the presiding judge of the Douglas county district court and had his action dismissed, "without prejudice." At this hearing it does not appear that the plaintiff's attorney's lien on file was called to the attention of the district judge who entered the order of dismissal. This attorney

swears that he is unable to tell who it was that requested him to make a call on Moorer that resulted in his employment by the latter. However, this attorney finally settled Moorer's case between the 10th and 15th of April, 1934. Plaintiff and McKenzie, his cocounsel, were neither consulted with nor advised of the settlement thus made and their claimed lien was wholly ignored. By the terms of this settlement thus made, the Travelers Mutual Casualty Company paid Lord Lister Hospital $115, Drs. Henry and Arntsen $100, and $800 for Moorer. Moorer then disappeared and could not thereafter be found and is said to have gone to Louisiana.

It appears that Gerald M. Vasak, who was one of the attorneys for the defendants, knew nothing about this settlement or the dismissal of the suit instituted by plaintiff and his cocounsel until a long time after it occurred. In part, his testimony is as follows: "A. When did you say it was dismissed? Q. February 5th. A. About three weeks after (February 26, 1934), I believe Mr. Lynch came to our office to pick up the file I had, and said there would be nothing more for me to do in the case and I had nothing more to do with it." Further that "He (Lynch) made his own settlement."

Attorney Vasak was employed by the Travelers Mutual Casualty Company for court work exclusively. While his firm's name appears in the record, as employed, whatever was entrusted to the firm by the Travelers Mutual Casualty Company he handled. He was neither consulted in or had anything to do with the settlement of the Moorer case. It is quite obvious from the entire record that this settlement was made by John D. Lynch, vice-president and general counsel for the Travelers Mutual Casualty Company, with the possible assistance of Mr. Schafer, claim agent working under his direction, who was with him on the occasion of his call on Moorer in the Lord Lister Hospital.

In view of the surrounding circumstances and the subsequent developments appearing in connection with this case, the proper application of the following excerpt from the

Canons of Professional Ethics of the American Bar Association is suggested, viz.: "9. Negotiations with Opposite Party.—A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Vol. 60, Reports of American Bar Association (1935), p. 685.

Under the facts of this record, the Travelers Mutual Casualty Company and John D. Lynch, its vice-president and general counsel, were clearly chargeable with notice of the existence of plaintiff's attorney's lien, and indeed with actual knowledge thereof at the time the subsequent settlement was made with Moorer and the money paid him. *Elliott v. Atkins,* 26 Neb. 403, 42 N. W. 403; *Cones v. Brooks,* 60 Neb. 698, 84 N. W. 85.

This court has long been committed to the view that, "An attorney may have a lien upon the claim of his client in an action for personal injury." *Corson v. Lewis,* 77 Neb. 449, 114 N. W. 281.

The situation here presented invokes the application of this rule, viz.: "A settlement made at the instigation of the attorneys for defendant, without the knowledge of the attorneys for plaintiff, and without making suitable and sure provision for their compensation, is viewed with suspicion." 7 C. J. S. 1183, sec. 231. This conclusion, which the record as an entirety sustains, is, in a measure, fortified by the failure of the defendants to produce the evidence of John D. Lynch at the trial in the district court. *Brown v. Maryland Casualty Co.,* 55 Fed. (2d) 159; *Lincoln Nat. Life Ins. Co. v. Erickson,* 42 Fed. (2d) 997; *Ryan v. Continental Casualty Co.,* 47 Fed. (2d) 472; *Aetna Life Ins. Co. v. Ryan,* 255 Fed. 483.

Under the facts disclosed by the present record, the defendants were not in any manner prejudiced by any delay which ensued after the dismissal of the action by Moorer as plaintiff, which had been instituted by the plaintiff herein as Moorer's attorney. We quite agree that Moorer possessed

the unquestionable right to dismiss the action at any time, as to his interest therein, but subject to his attorneys' rights, and upon payment of taxable costs. But in the instant case, under the facts presented, the Travelers Mutual Casualty Company being chargeable with actual knowledge of the terms of the attorney's lien filed by plaintiff made their subsequent settlement with Moorer subject to plaintiff's rights.

At the close of the evidence at the trial in the district court, there were no disputed facts for a jury to determine. Indeed, there was no substantial conflict in the evidence on points material to the controversy, and no inferences about which reasonable men might differ to be drawn from the facts and circumstances proved. Even as to the amount of recovery, the plaintiff, if entitled to recovery at all, was entitled to recover a specified per cent. on an amount specified and rendered certain by unchallenged facts. The trial court, therefore, properly withdrew from the jury further consideration of the case at the close of all the evidence. *Depugh v. Brown*, 158 Ia. 165, 138 N. W. 908; 64 C. J. 344, 361; *Chicago, B. & Q. R. Co. v. Bernard*, 32 Neb. 306, 49 N. W. 362; *Linton v. Baker*, 1 Neb. (Unof.) 896, 96 N. W. 251; *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, 107 Neb. 494, 186 N. W. 529.

It must be conceded, under the terms of our Nebraska statute (Comp. St. 1929, sec. 7-108), as it has heretofore been construed in this jurisdiction, that, after an attorney's lien has attached, the party adverse to his client cannot, if he has notice thereof, destroy it by a voluntary settlement made without consent or knowledge of the attorney without rendering himself liable for the value of the lien. 5 Am. Jur. 408, sec. 246; *Noell v. Missouri P. R. Co.*, 335 Mo. 687, 74 S. W. (2d) 7, 94 A. L. R. 684; *Gibson v. Chicago, M. & St. P. Ry. Co.*, 122 Ia. 565, 98 N. W. 474; *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281.

It follows that the judgment entered by the trial court in this case is right, and it is

AFFIRMED.

LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT, V. PLATTE COUNTY ET AL., APPELLEES.

280 N. W. 430

FILED JUNE 15, 1938. No. 30286.

1. **Drains: APPEAL.** The right to appeal from the assessment of benefits by the county board in the creation of a drainage district is not the right of appeal provided by section 31-115, Comp. St. 1929.
2. ———: ———. An examination of the evidence in this case discloses that an appeal under the statutes was not authorized because this was an assessment of the benefits.
3. ———: ———. When a county board makes assessments to construct a drainage ditch, error will lie to the district court.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

C. N. McElfresh and *August Wagner,* for appellant.

Jesse L. Dougherty, George C. Holdrege, T. F. Hamer and *Otto F. Walter, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is an appeal from the judgment of the district court denying the Loup River Public Power District the right to appeal or prosecute error from the action of the county board in the matter of the Looking Glass Drainage Ditch. This involves the construction of the statutes and their application to this particular case. Strictly stating the action of the trial court, it sustained the motions of the Union Pacific Railroad Company and the county of Platte to dismiss the appeal of the district and to strike the petition and dismiss its application for writ of certiorari.

The question presented here is the legal method of procedure from the county board to the district court by one dissatisfied with the assessment of benefits by said board in the establishment of a drainage district. The appellant in-

sists that it is entitled to appeal from the order of the county board (a) awarding compensation for land appropriated, and (b) allowing damages to property affected by the improvement. This right is given to it, states the appellant, by section 31-115, Comp. St. 1929, which is: "Any person or corporation feeling aggrieved thereby may appeal to the district court within and for the proper county, from any final order or judgment of the board made in the proceedings and entered upon their journal determining either of the following matters, to wit: * * * Third. The compensation for land appropriated. Fourth. The damage claimed to property affected by the improvement; which appeal may be taken and prosecuted in the manner provided by law for appeals from the decision of county board on claims against the county."

The drainage ditch involved here was established and constructed under the provisions of chapter 31, Comp. St. 1929. The district at least partially relied upon section 31-115, Comp. St. 1929. The right to appeal from the assessment of benefits by the county board in the creation of a drainage district is not given by section 31-115, Comp. St. 1929.

The nature of the appeal is questioned, and it is necessary to determine if this is an appeal from the assessment of benefits, or an appeal from the award of compensation of land appropriated, or allowing damages to property. The matter was before the county board of Platte county on the report of the engineers for the ditch. Neither the railroad nor the district had made any claim for damages. The summary of the engineer's report as to benefits, in so far as applicable to this case, is as follows:

(a) District, canal right of way, 9,200 feet	$5,912.00
(b) Railroad, right of way, 10,000 feet	4,941.00
(c) County, public roads, 15,300 feet	1,800.00
(d) Other property owners	4,147.00
Total estimated benefits	$16,800.00

The engineer's estimate of the cost of the ditch is:

Excavation	$ 6,370.00
Right of way (Including $49.50 to R. R.)	2,187.00
Damages	100.00
Highway bridge	1,800.00
Railroad bridge	3,491.00
Raising railroad track	1,450.00
Culvert and bridge approaches	200.00
Engineering, advertising, etc.	1,202.00
Total estimate cost	$16,800.00

The engineer in his report added this note: "In order to make a just distribution of the costs of this project, the Union Pacific Railroad will maintain the railroad bridge over this ditch at their own expense; and all lands, etc., included in this apportionment, including the Union Pacific Railroad, will share proportionately in the costs of maintenance of all other parts of this project."

It is obvious from the summary of the report which appears in the transcript as a part of the petition that this is merely an estimate of the cost, and an assessment of the benefits against the various property owners, including the railroad and the district. The acceptance of the report by the county board was not such as comes within the purview of section 31-115, Comp. St. 1929, providing that an appeal may be made from the board to the district court. In such a case, an appeal from the board is specifically provided by section 20-1901, Comp. St. 1929, which provides: "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

A part of the same chapter provides: "The proceedings to obtain such reversal, vacation or modification, shall be by petition entitled 'petition in error,' filed in a court having power to make such reversal, vacation or modification." Comp. St. 1929, sec. 20-1903.

This case is comparable to the late case of *Roberts v. City of Mitchell,* 131 Neb. 672, 269 N. W. 515. In that case the rule applicable was stated so well that we quote: "Whether a proceeding shall be taken by appeal from a tribunal, clothed by the legislature with power to decide in the first instance, for review by the district court, is fixed by the statute creating such tribunal and giving it its powers. The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist. So, in *McCague Investment Co. v. Metropolitan Water District,* 101 Neb. 820, 165 N. W. 158, it was held that the statutes make no provision for appeal from the equalization and assessment of special taxes by a metropolitan water district, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review the order made; and in *Whedon v. Lancaster County,* 76 Neb. 761, 107 N. W. 1092, it was held that the statutes make no provision for an appeal from the order of the county board in making the tax levy, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review such order."

A very similar case was presented to the court some years ago. When it was considered a second time, this court held in substance that, when a county board fixes assessments to pay for the construction of a drainage ditch, error will lie to the district court. *Dodge County v. Acom,* 72 Neb. 71, 100 N. W. 136. In that case language so applicable to the present case was used that it is repeated: "Again, on principle, a party to a suit would be entitled to prosecute error where no appeal is provided for. The act in question provides for an appeal from certain of the findings and orders of the board, but not from the order fixing the assessments. One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for."

Of course, no appeal lies from the assessment, but the appellant insists that this was more than a mere assessment of the benefits. This court does not share this opinion. This

cannot be an allowance of damages because neither the Union Pacific Railroad Company nor the Loup River Public Power District claimed or were awarded any damages in the matter.

In such cases error to the district court would be the proper remedy under the statutes. An appeal was attempted in this case, and when the trial court indicated that the appeal was not the remedy, the district made an attempt to change the proceeding by filing an amended petition to one seeking a writ. Of course, one cannot be deprived of the right of appeal, but that appeal must be prosecuted as provided by the statutes. This court does not state that the appellant has an adequate remedy by proceeding in error. That question is not before the court. But the appellant has not the right after the time has elapsed for prosecuting error to change a former appeal proceeding so that it will be an error proceeding and benefit from the time within which the wrong remedy was pursued. The instant case does not fail because of a procedural misconception, but because the evidence does not sustain the contention of the appellant. This is not a claim for compensation for land appropriated or a claim for damages to property affected by the improvement. A proceeding in error is the proper remedy under our statutes, and it must be taken within the time provided by statute.

AFFIRMED.

CHARLES F. BARTH, APPELLEE, V. CORA REBER ET AL., APPELLEES: NEBRASKA STATE BANK OF MILFORD ET AL., APPELLANTS.

280 N. W. 219

FILED JUNE 15, 1938. No. 30287.

Evidence. The consideration stated in a written contract, if merely a recitation of fact, may be varied or modified by parol evidence to establish the actual consideration of any contract.

APPEAL from the district court for Seward county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

George I. Craven, for appellants.

Charles F. Barth and *J. J. Thomas, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This was a suit to foreclose a mortgage on the property of Reber. The validity and regularity of the mortgage are not presented by the appeal, but rather the validity and priority of two different assignments of the mortgage. A brief summary of the facts seems necessary to a determination of this case. In the beginning, Reber was indebted to Jarrett in the sum of $600. Jarrett enlisted the aid of the bank in the collection of this debt. To accomplish this, Koenig, the cashier and managing officer of the bank, took a mortgage to Jarrett to secure this $600, and an additional $550 as well. This mortgage was assigned at once to the bank by Jarrett. There is evidence in the record that Reber required $550 more in his business, and the additional amount was to establish this credit. The bank closed soon thereafter for insolvency, and this assignment, together with the note, was found in the note case of the Nebraska State Bank of Milford, and is one of the assignments involved in this case. The evidence is that Jarrett did not receive any consideration for his $600 interest in the note. It was contended, and the trial court found, that this interest was assigned to the bank only for collection. Reber also testifies that he did not receive $550 nor any other sum as consideration for the note over the $600 he owed Jarrett. A witness stated that Jarrett had numerous unpaid checks, carried as cash items by the bank, which were taken up by the assignment of the $600 interest in the note. The assistant cashier and bookkeeper who worked in the bank at the time stated this was not a fact. The records of the bank do not show any such transaction, and do not aid in the de-

termination of the question. The assistant cashier heard the conversation between Koenig and Jarrett, and that the note and the assignment were for the purpose of collection only. Two days before the bank closed $400 was indorsed on the Reber note as payment, but it is not disclosed who paid the money. Reber emphatically denies that he paid anything on the note. Soon after the bank closed Jarrett, upon inquiry, was told by Koenig that the transaction did not go through and was entirely eliminated.

About three years later Jarrett was indebted to Barth in the sum of $800, and he assigned his $600 interest in the note and mortgage to him. Barth is a party to this suit and claims under his assignment to the extent of $600. The other party is the receiver, or his assignee, of the Nebraska State Bank of Milford, who claims ownership under the first assignment heretofore described.

The appellants invoke the general rule that, where an agreement between parties has been reduced to writing, parol testimony cannot be introduced to vary or modify the written contract. The assignment recites the receipt of certain money by the assignor. From the evidence, except from the rather indefinite testimony of Koenig, it appears that Jarrett did not receive anything from the bank.

May the nonpayment of the recited consideration be proved by parol? This court has held previously, as cited, that the true consideration for a deed may be shown. In *Goodman v. Smith,* 94 Neb. 227, 142 N. W. 521, this court held: "The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration." Of a like import is the holding in *Logan Valley Bank v. Christensen,* 98 Neb. 49, 151 N. W. 939. More recently this court, in *Hartman v. Lipovsky,* 122 Neb. 823, 241 N. W. 563, said: "As a general rule 'A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony.' *Latenser v. Misner,* 56 Neb. 340. The court is of the opinion, however, that the case at bar does not fall within the above rule. In

the case under consideration the words '$4,000 in cash, the receipt whereof is hereby acknowledged,' is a recitation of fact and not a contractual part of the contract. This court has held that the acknowledgment of the receipt of the consideration, or a part thereof, is not a contractual part of an agreement and may be explained or contradicted by parol evidence." In that case it was also held: "The true facts as to the consideration, or a part thereof, named in a written contract can be varied by parol evidence, when it is merely a recitation of fact and not contractual or promissory in its nature."

In the case of a note, parol evidence is admissible to show that it was given for accommodation and without consideration. *Luikart v. Meierjurgen,* 124 Neb. 816, 248 N. W. 379. A review of our cases caused one to state: "That the contract was lacking in consideration from its inception may be shown by extrinsic evidence, providing the proof thereof does not contradict or vary the contractual consideration named in the written contract; however, it may be shown that the contractual consideration named in the instrument was not in fact paid or received. This is based upon the fundamental principle that parol or extrinsic evidence, which tends to establish the nonexistence of the contract as a valid and effective instrument, cannot be said to contradict or vary the terms thereof, the latter applying only to instruments which are legally operative as contracts. The admission of extrinsic evidence to establish the actual consideration of any instrument is, of course, for the purpose of establishing want or failure of consideration, or the illegality thereof." 4 Neb. Law Bulletin, 137.

The rule applicable to this case may be stated to be that the consideration stated in a written contract, if merely a recitation of fact, may be varied or modified by parol evidence to establish the actual consideration of any contract.

As applied to the assignment given by Jarrett to the bank, it means that one can show by extrinsic or parol evidence that there was a want or failure of consideration as to the assignment. The true consideration for the original

note may be shown. In this case it is apparent that the finding of the trial judge was correct in that there was no consideration for the assignment by Jarrett to the bank, and that the only consideration for the original note was the $600 debt which Reber owed Jarrett. This court concludes that the findings of the trial court that the note was assigned to the bank for collection only, and that the assignment to Barth later was good as to $600, the only sum Jarrett ever claimed due him from Reber, are correct and its judgment is

AFFIRMED.

MRS. R. F. MOORE, APPELLEE, V. WASHINGTON NATIONAL INSURANCE COMPANY, APPELLANT.
280 N. W. 221

FILED JUNE 15, 1938. No. 30321.

1. **Insurance:** CANCELATION. An examination of the evidence does not reveal when the policy lapsed for nonpayment of premiums and the agent continued to collect until the accidental death of insured, so that the provision for termination of policy upon nonpayment of premiums by a third party can be invoked.
2. ———: ESTOPPEL. An insurer denying liability for death benefits under an accident policy on the ground of cancelation cannot interpose the defense that the policy had terminated for nonpayment of premiums after the commencement of an action on the policy.
3. ———. Evidence examined and *held* to support verdict against insurance carrier that there was no cancelation before the accident resulting in death.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellant.

Charles E. Matson and *Ginsburg & Ginsburg, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is an action on a policy of accident insurance. The Washington National Insurance Company appeals from the judgment of the district court. The appellant contends that the policy was not in force at the time of the accidental injury and death of the insured, June 28, 1934, because of (1) nonpayment of premium, and (2) notice of cancelation posted May 25, 1934.

There is no question as to the fact that the policy was issued to the insured about November 30, 1933, and that the accident was covered by the policy. The policy is a very limited one, issued in connection with a subscription to the Omaha Bee-News. There is some dispute in the record, but it seems that the regular rate for the paper alone was 20 cents a week, and that with the insurance policy it was 25 cents a week. This was paid to the carrier until the time of the accidental death of the insured. The policy itself states: "This policy is issued in consideration of the premium of ten cents ($0.10) per month and of the subscription by the Insured for The Omaha Bee-News, for a period of thirty (30) days from date hereof, beginning and ending at twelve o'clock noon, Central Standard Time, of the day this policy is dated, and it may be renewed for such further periods of time as the Omaha Bee-News pays the premium therefor and the Insured shall continue as a regular subscriber (viz.: a home-delivery or mail-subscriber, paying regularly therefor and not being in arrears in such payments) to the Omaha Bee-News."

The insurance company and the Omaha Bee-News had an agreement that the latter would pay the former for the policies in force, and that credit would be extended for the monthly premiums, and that upon a set date cancelation would be offset against the charges for new business. The insurance company did not receive notice of cancelation of this policy until June 4, 1934. There is nothing to indicate when the policy terminated except the notice of cancelation which provided that the policy should be canceled five days after May 25, 1934. This notice of cancelation

was sent by the Omaha Bee-News, signed by the circulation manager as also the registrar of the insurance company. The policy is claimed to have been terminated by the notice of cancelation and the failure of the Omaha Bee-News to pay the premiums upon it. In entering into such an arranged method of doing business, the insurance company made the Omaha Bee-News its agent for issuing and canceling policies. The insured continued to pay his subscription price, as well as the extra rate for the insurance policy, to the Omaha Bee-News until his accidental death. The termination of the policy depends upon the validity of the attempted cancelation. The company urges this cancelation, and gave it as a reason for refusing payment of the claim in a letter from the Omaha Bee-News on July 2, 1934, to Mr. C. A. Moore, the father of the insured. An examination reveals that neither the insurance company nor the Omaha Bee-News gave the beneficiary or her agents any reason, other than cancelation, for declining to pay the claim until this action was commenced and an answer was filed. The Omaha Bee-News was the agent for the insurance company for the issuance of said policies. It collected in the instant case. The Bee-News signed the notice of cancelation and claimed to have sent it by regular mail to the insured at Fairmont. It was the only contract the insured had with the company. The record indicates that the Washington National Insurance Company and the Omaha Bee-News were one and the same as far as the insured was concerned, notwithstanding anything that may be written in the policy. An examination of the evidence does not reveal when the policy was lapsed for nonpayment of premiums and the agent continued to collect until the accidental death of the insured, so that the provision for termination of policy upon nonpayment of premiums by a third party may be invoked. *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587, 81 N. W. 620. The insurance company in the case has failed to sustain the burden of proof. It has been established that the insured paid the premiums required for the policy to the Omaha Bee-News. This court has con-

sistently maintained the doctrine that an insurer denying liability for death benefits under an accident policy on the ground of cancelation cannot interpose the defense that the policy had terminated for nonpayment of premiums after the commencement of an action on the policy. *Serven v. Metropolitan Life Ins. Co.*, 132 Neb. 637, 272 N. W. 922. See the cases cited therein, and, also, *Ross v. First American Ins. Co.*, 125 Neb. 329, 250 N. W. 75. The reason given in the instant case for denying liability was the cancelation attempted May 25, 1934, and not the termination of the policy for nonpayment of premiums.

The statutes of Nebraska provide, as applicable to the policy in this action, that it may be canceled by giving the insured written notice of such cancelation, or mailing a registered letter with proper postage affixed thereto, addressed to the insured at his usual or last known post office address. Comp. St. 1929, sec. 44-604. The cancelation in this case was under provision 16 of the standard provisions of the policy. It states: "The company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address, as shown by the records of the Company, together with cash or the Company's check for the unearned portion of the premiums actually paid by the Insured, and such cancelation shall be without prejudice to any claim originating prior thereto." A letter in the record from the Omaha Bee-News, signed by John W. Kurtz, circulation manager, who also signed another letter as registrar of the Washington National Insurance Company, states the fact that the policy was canceled under provision 16 of the policy.

A policy of insurance can be canceled under the provisions of the statute, or according to the provisions of the policy. Recently this court said: " 'Where a valid contract of insurance has been effectuated, the company cannot cancel the policy without consent of insured, except where it may be permitted to do so by statute or by a reservation in the policy itself. Such a reservation is valid, but, under the general rule, it will be strictly construed against the com-

pany.' 32 C. J. 1245." *Petersen v. Ohio Casualty Ins. Co.*, 131 Neb. 128, 267 N. W. 393. At about the same time we said: "Except as a right of cancelation of an insurance policy is provided for by statute, or reserved in the contract, neither the insured nor the insurer can effect a cancelation without the consent of the other, * * * such cancelation can be effected only by a strict compliance with the terms and conditions provided therefor by the contract and by statute." *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N. W. 454. In the previous case cited, *Petersen v. Ohio Casualty Ins. Co., supra,* it was stated: "The burden of establishing an effective cancelation before loss is on the insurer. Notice of cancelation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional."

As applied to this case, the law of Nebraska is that this policy of insurance might be canceled by giving the insured written notice of cancelation or mailing a notice by registered letter to the insured at his usual or last known address. Comp. St. 1929, sec. 44-604. This provision as to cancelation was required to be in the policy. An insurance policy must be considered as containing the statutory requirements. *Kelly v. Prudential Ins. Co.*, 130 Neb. 873, 266 N. W. 757. There is no evidence that any registered letter was sent to his usual or last known address, notifying him of the cancelation of the policy. The company proceeded under section 16 of the policy and the Omaha Bee-News mailed, by ordinary post, the notice of cancelation. The question of the receipt of such a letter was a question of fact for the determination of the jury. Likewise the question of the sending of such a letter and all the circumstances were questions of fact for submission to the jury. It was so submitted to the jury, and the verdict was against the insurance company. It was necessary for the insurance company to show that it had given the insured written notice of cancelation as provided in the statutes and in the policy. This it failed to establish. The proof as to the send-

ing of the letter is subject to the objection that there is not testimony as to the particular notice. There is evidence that it was one of many it wrote on a given day, and that they were mailed. There is no positive proof that this was written and mailed except that it was one of many which should have been. There is no proof that the insured ever received the written notice. The verdict of the jury is sustained by the evidence. There is no reversible error in the record.

AFFIRMED.

EARL L. NELSON, APPELLANT, V. RALPH E. ROSENBERG, APPELLEE.

280 N. W. 229

FILED JUNE 15, 1938. No. 30364.

1. **Libel and Slander.** Actionable words imply damage to the party, but there is a marked distinction between libel and slander. Many words which are actionable *per se* when published in a newspaper would not be actionable when spoken, without alleging and proving special damage.
2. ———. Words to be slanderous *per se* must not only charge an offense which is actionable, but also the nature thereof.
3. ———. The innuendo does not add to or enlarge the slanderous words used, but sets out the meaning intended to be conveyed by showing the application of the words.
4. ———. The appellation "crook" is a derogatory and disparaging term of abuse, but it will not constitute a basis for the recovery of damages in the absence of specific allegation of special damages.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

M. O. Bates, for appellant.

Cook & Cook and *W. A. Stewart, Jr., contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

PAINE, J.

To an amended petition asking damages for the utter-

ance of alleged slanderous words in the presence of divers persons, a demurrer was sustained, and the petition dismissed.

The plaintiff, in his amended petition, brought action under section 20-839, Comp. St. 1929, and alleged that the defendant, wickedly intending to injure the plaintiff, in the presence and hearing of divers persons, falsely and maliciously did speak, utter, and publish these false, slanderous, and defamatory words of and concerning the plaintiff: "He is not reliable;" "he is one of the biggest crooks in Dawson county;" "he wouldn't pay an honest debt if he could get out of it." Then followed the allegation that by innuendo defendant intended to impute that plaintiff was a dishonest person, that he was a tricky and underhanded schemer, that he was a thief or swindler, a sharp, a cheat, a professional rogue, or a person who belonged to the criminal class, knowing that such statements and innuendo were wholly false, malicious, and slanderous; that by reason thereof plaintiff has been greatly injured in his character, credit, reputation, and business and social standing in the community, and his name has been brought into public scandal, infamy, and disgrace, that he has suffered great anxiety and pain of body and mind, to his damage in the sum of $7,000.

To this amended petition a general demurrer was filed, and after argument the court sustained the demurrer and gave plaintiff 15 days to file an amended petition. The plaintiff, electing to stand upon his amended petition, refused to plead further, and the action was dismissed.

The plaintiff insists that his petition stated a cause of action, and that the words used constituted slander within the meaning of the law. It is true that "A demurrer to a petition in an action for libel or slander admits the allegation that the defamatory words were duly published, as well as the allegation that the words were false and uttered with malice, but it does not admit any inferences of fact, or conclusions of law which may chance to be averred." 17 R. C. L. 398, sec. 153.

The first question which arises in respect to the allegations of the petition is whether the particular words used are actionable *per se,* for the same rules do not apply to libel as to slander, the law of slander being much narrower in scope than that of libel, for it has been held that defamatory matter printed and published may be actionable *per se,* while the same matter orally published would not be so. 36 C. J. 1152.

It has been frequently held that no action lies for a mere verbal abuse and calling of names in the absence of an allegation of special damages. *Vinson v. O'Malley,* 25 Ariz. 552, 220 Pac. 393, 37 A. L. R. 877.

In the leading case of *Pollard v. Lyon,* 91 U. S. 225, 23 L. Ed. 308, Mr. Justice Clifford said: "Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage."

Words charging one with being a thief are not actionable *per se* when they are spoken in an outburst of excitement and passion, being understood by the hearers to be mere terms of abuse. *Yakavicze v. Valentukevicious,* 84 Conn. 350, 80 Atl. 94, Ann. Cas. 1912C, 1264; *Davis v. Meyer,* 115 Neb. 251, 212 N. W. 435.

Pollock, C. B., said: "It is, therefore, not more actionable to call a man a 'blackleg' than it is to call him a 'villain,' a 'cheat,' a 'swindler,' or any other opprobrious term not necessarily imputing the commission of a particular crime." *Barnett v. Allen,* 3 Hurlst. & N., *376, 157 Eng. Reprint, 516, and it was held that the term "blackleg" was not actionable *per se.*

The plaintiff cites *Mertens v. Bee Publishing Co.,* 5 Neb. (Unof.) 592, 99 N. W. 847, in which it was said of a man that he would not pay his honest debts, that he owed his tailor for making the garments in which he was married, and owed his physician for attending his first wife during

her fatal illness, and owed other bills too numerous to mention. However, the article making this newspaper attack was nearly a column in length, and a series of such articles were published. This court held that these charges were libelous *per se*, as the law implied malice when such false statements were given publicity through a newspaper.

This court has taken the stand: "If the published words are obviously defamatory, that is, libelous *per se*, it is not necessary by innuendo to allege or explain the meaning of the words published, nor to allege special damages." *Callfas v. World Publishing Co.*, 93 Neb. 108, 139 N. W. 830. And in a very recent case we have held that "Words to be slanderous *per se* must not only convey the expression of a wrong which is actionable, but also the nature of the particular wrong," and that if such words are used which are not slanderous *per se* it is necessary to allege and prove special damages. *Hudson v. Schmid*, 132 Neb. 583, 272 N. W. 406.

In the case at bar, the plaintiff set out the words in his petition which are claimed to be defamatory, and then deemed it necessary to add an innuendo to make the meaning of these words clear to the jury to which he hoped to submit the action. If it was necessary to use an innuendo, it was just as necessary to allege and prove the special damages which resulted from the plaintiff's use of these words.

It is not the purpose of the innuendo to set out any additional facts, but it is used to explain what is ambiguous about the slanderous words. If the meaning is plain, no innuendo is needed. The innuendo does not add to or enlarge the slanderous words used, but simply sets out the meaning intended to be conveyed by ascribing a meaning, of which the words may not be easily susceptible, by showing the application of the word. *Sturdivant v. Duke*, 155 Ky. 100, 159 S. W. 621, 48 L. R. A. n. s. 615; *Wisner v. Nichols*, 165 Ia. 15, 143 N. W. 1020; *Estelle v. Daily News Publishing Co.*, 99 Neb. 397, 156 N. W. 645; *Id.* 101 Neb. 610, 164 N. W. 558.

It is said that spoken words are "slanderous *per se*" only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform duties of an office or employment, prejudice him in his profession or trade, or tend to disinherit him. *Axton-Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 64, 183 S. W. 269, L. R. A. 1916E, 667, Ann. Cas. 1918B, 560. See, also, *Walker v. Bee-News Publishing Co.*, 122 Neb. 511, 240 N. W. 579; *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813, 144 N. W. 810.

The plaintiff stated in his argument that to say of a man that "he is one of the biggest crooks in Dawson county" classifies him as a public enemy, a professional rogue, a criminal to be shunned by law-abiding citizens. Now, in determining whether the words are actionable, the court will not resort to any technical construction of the language used, but construe it in its ordinary and popular sense.

The word "crook" is ordinarily used to denote a person who has been guilty of some dishonest, wrongful, or deceitful conduct, such as might or might not subject him to criminal prosecution, but it certainly does not of itself express, or with any degree of certainty suggest, the nature of the wrong done, for while it is a term of reproach, it is not a word that clearly charges any particular crime. This court finds that the words used, to wit, "crook" and "not reliable," were clearly words of general abuse; that they were derogatory and disparaging, but that they do not constitute a basis for a recovery of damages in the absence of a specific allegation of special damages.

We have, therefore, reached the conclusion that the words alleged to have been used are not slanderous *per se*, and that plaintiff was not entitled to recover, as no special damage was alleged, and therefore the trial court was right in sustaining the demurrer and dismissing the petition.

AFFIRMED.

ROSE, J., dissents.

ORCHARD & WILHELM COMPANY, APPELLANT, V. GRENVILLE P. NORTH: GERTRUDE MAY ET AL., APPELLEES.
280 N. W. 272

FILED JUNE 15, 1938. No. 30357.

1. **Garnishment.** "In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment." *Early v. Belgrade-Hord Co.*, 133 Neb. 884, 277 N. W. 596.
2. ———: PROCEDURE. When the answer of the garnishee is such as to give the court jurisdiction over a fund, the court should enter an order directing the garnishee to pay the fund into court, and, if there be a claimant other than the judgment creditor, enter an order impleading the claimant, require the framing of the issues by written pleadings and make a determination of the rights of all the parties upon the evidence adduced in support of the issues thus made up.
3. ———. When an officer of a court has been ordered by the court to pay over to the person entitled thereto a sum of money in his custody, and nothing remains to be done except to pay it over, the fund is subject to garnishment.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

Howard Saxton, for appellant.

Grenville P. North and *E. H. McCarthy, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

In this case, the Orchard & Wilhelm Company caused a garnishment in aid of execution to be issued against Frank McGrath, clerk of the district court for Douglas county, and Gertrude May, it being alleged that each of said garnishees had funds in his possession belonging to the judgment debtor, Grenville P. North. From an order discharging the garnishees, the Orchard & Wilhelm Company appeals.

The record discloses that the Orchard & Wilhelm Company obtained a judgment against Grenville P. North on November 28, 1931, in the sum of $1,460.65, with interest

thereon at 7 per cent. per annum from October 30, 1931, no part of which has been paid. On October 8, 1937, a garnishment in aid of execution was commenced against Frank McGrath, clerk of the district court, and Gertrude May, as garnishees. On October 13, 1937, Gertrude May filed her written answer stating that she had no funds in her possession belonging to Grenville P. North, the judgment debtor. On October 18, 1937, Gertrude May appeared in court and testified that she had no funds in her possession belonging to Grenville P. North. The court thereupon discharged her as garnishee. This ruling was correct, the applicable rule being as follows:

"In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment.

"A judicial order on a garnishee to turn over money or property in aid of execution can be made only upon an unqualified admission by him of a present indebtedness which the execution debtor would be entitled to but for the garnishment." *Early v. Belgrade-Hord Co.*, 133 Neb. 884, 277 N. W. 596. See, also, *Orchard & Wilhelm Co. v. North*, 125 Neb. 723, 251 N. W. 895.

The unqualified testimony of Gertrude May under oath required the court to discharge her as garnishee. If the disclosure of the garnishee was untrue, the remedy is by a direct suit against the garnishee. We conclude that Gertrude May was properly discharged as garnishee by the trial court.

On October 13, 1937, Frank McGrath filed his answer as garnishee alleging that, in a certain divorce action pending in the district court for Douglas county, the judgment debtor, Grenville P. North, had been allowed an attorney's fee of $750 which had been paid to him as clerk of the district court. His answer alleged that North had assigned the attorney's fee to Gertrude May by a written assignment filed in his office before the garnishment summons was served and, for that reason, there was no property in his possession belonging to North. He also alleged in his answer

that the $750 was *in custodia legis* and not subject to garnishment.

The evidence establishes the fact that the $750 was in the hands of the clerk of the court for one purpose only—payment to North. The court had no claim upon it and there were no conditions attached that would in any way indicate that the fund was *in custodia legis*. The rule is: "The rule that funds arising from judicial process are not subject to garnishment is subject to many exceptions. While an officer holding money merely as an agent of the law is not subject to garnishee process, if anything arises to change this relation from an official to a personal obligation, he then becomes amenable to such process. * * * Another exception arises where the officer has been ordered to pay over the funds. Many courts take the view that after an order to pay over the funds the court officer or person having custody of the fund will be treated as the agent of the party entitled to the fund and therefore subject to garnishment, though this has been denied." 12 R. C. L. 810, sec. 41.

In *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. 818, this court said: "The most comprehensive rule as to garnishment would seem to be that laid down in the Nebraska Pleading and Practice, p. 509, that 'a person who holds money subject to certain conditions, upon the fulfilment of which it is to become the property of a third party, is not liable as garnishee in an action against the latter until the conditions have been fulfilled.' And when those conditions are complete, we hold that he is liable, subject to the legal exceptions laid down by the author. There is to be a limit even to the rule of judicial custody, and that limit is reached, as in this case, when the judgment and costs are satisfied, and the remainder, in the hands of the sheriff, is subject to garnishment as money acknowledged to be due to this judgment debtor. The court has discharged its functions, has satisfied its suitors, and is no longer custodian of the costs of levy and sale which had become the perquisites of those entitled to them."

The conclusion follows that the fund in question was not *in custodia legis* at the time the garnishment process was served.

The answer of Frank McGrath discloses that he had $750 in his possession which was paid for the benefit of North, but alleges that a written assignment of the fund had been filed in his office for the benefit of Gertrude May and as a result thereof he had no funds in his possession belonging to North when the garnishment summons was served. This was not an unqualified denial that the garnishee had funds in his possession belonging to the judgment debtor. It raises issues that are for the court to determine. The proper practice under such circumstances is for the garnishee to file an affidavit in interpleader suggesting the names of all persons claiming an interest in the fund. The court should then require the payment of the fund into court and require those claiming an interest in the fund to interplead and set up their claims thereto. Upon the issues thus formed, the court, after the taking of evidence, determines the respective interests of the parties. In the instant case there was no order made requiring the parties interested to interplead. The court, however, elected to treat the answers on file as petitions in interpleader. We find no error in the trial court's action in so doing. The trial court, however, refused to take evidence before determining the rights of the parties to the fund. It is clearly the rule that, where the court obtains jurisdiction of a fund by garnishment proceedings, it necessarily follows that the claims of all persons claiming an interest in the fund should be heard and an order entered determining their respective rights thereto. While it is true that the court's jurisdiction over a fund in the hands of a garnishee is determinable from the answer of the garnishee, yet, if jurisdiction does attach, the determination of the interests of all the parties is for the court.

In this case the answer of the garnishee was such that the court acquired jurisdiction over the fund. This being true, the court erred in not taking the evidence of Gertrude May and the Orchard & Wilhelm Company in support of their claims to the fund.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

IN RE ESTATE OF MARGARET WEITZEL.
ELIZABETH BRILL, APPELLEE, V. CONRAD WEITZEL, EXECUTOR, APPELLANT.
280 N. W. 270

FILED JUNE 17, 1938. No. 30269.

1. **Evidence.** "Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed." *Spiegal & Son v. Alpirn*, 107 Neb. 233, 185 N. W. 415.
2. ———. "The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration." *Spiegal & Son v. Alpirn*, 107 Neb. 233, 185 N. W. 415.
3. ———. "In so far as a deed is deemed to be contractual, it is subject to the parol evidence rule the same as any other contract." 4 Neb. Law Bulletin, 134, sec. 11.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed, with directions.*

Evans & Lee, for appellant.

George I. Craven and *Walker & McArthur, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

GOSS, C. J.

Elizabeth Brill had a verdict and judgment for $4,000 against the estate of her mother, Margaret Weitzel, de-

ceased. Her brother, Conrad Weitzel, as executor of the estate, appealed.

The record shows that Elizabeth Brill filed her claim in the county court for services in caring for her mother from October 14, 1922, to May 10, 1935 (except for periods aggregating about one year), at a monthly rate of $50 or a total of $7,100, on which claim she credited $2,000 as the reasonable value of a home conveyed to her by her mother on December 17, 1925, leaving a balance claimed of $5,100. The county court dismissed this claim and she appealed and tried the cause to the jury in the district court, with the result heretofore indicated.

In the district court Elizabeth Brill alleged that, upon the death of her father, George Weitzel, on October 14, 1922, the mother, Margaret Weitzel, and Elizabeth Brill and her husband, Peter Brill, entered into an oral agreement by which the Brills agreed to remain in the house owned by Margaret Weitzel and "to attend to all things necessary to the wants of Margaret Weitzel, including food, personal attention, medical attention, and the necessary comforts of life. In consideration therefor Margaret Weitzel promised and agreed to convey or devise to Elizabeth Brill the house owned by Margaret Weitzel, and in addition thereto to pay to Elizabeth Brill the reasonable value of her services, in addition to any and all devises or bequests that Margaret Weitzel might confer upon plaintiff by her last will and testament;" that plaintiff performed all the terms of the agreement from the death of George Weitzel on October 14, 1922, until the death of Margaret Weitzel on May 10, 1935; that on December 17, 1925, Margaret Weitzel, pursuant to her promise, did convey the house to plaintiff by warranty deed but plaintiff did not read the deed at the time, "but afterwards, in September, 1932, did read the deed, and then discovered for the first time that said deed is ambiguous and contradictory, and that although said deed purports to be in performance of the oral agreement between Elizabeth Brill and Margaret Weitzel it does not set out said agreement in full."

It is not necessary to state more than briefly the long answer filed by Conrad Weitzel, the executor. By general denial and by specific allegations it raises the necessary issues. It pleads the provision in the deed referred to by Elizabeth Brill in her petition and alleges that by accepting the same she is estopped to deny that it embodied the contract between her and her mother for payment of her services for care of the mother.

The deed is in evidence. It was executed by Margaret Weitzel in the presence of two disinterested witnesses on December 17, 1925, and recorded two days later. It was delivered to Mrs. Brill. She claims she put it in her safe deposit box and never read it until 1932. The deed contained these words: "This deed is given in consideration of Elizabeth Brill, daughter of the grantor, having taken care of grantor since October 4, 1922, and in consideration of the daughter, Elizabeth Brill, furnishing the grantor, her mother, Margaret Weitzel, a proper home, with all necessary food and medical attention and all proper care or attention necessary for the grantor, Margaret Weitzel, during her life. Upon the grantee, Elizabeth Brill, having taken care of the grantor, Margaret Weitzel, during her life and upon the death of Margaret Weitzel, the aforesaid property shall vest in fee simple in said Elizabeth Brill."

All through the trial the executor had, and now has, presented the theory that the provision of the deed was contractual in its nature and could not be varied by parol evidence. He objected to the introduction of parol evidence to vary the contract as expressed in this deed, and moved for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence, but was overruled on the theory that parol evidence could be considered. Upon the proper decision of this point of law the controversy hinges.

In the consideration of this question it should be noted that there was no attempt to reform the deed; no pleading sought that end. There was no ambiguity in the deed. Its words are clear and uncontradictory. It purports to state the full contract between the parties.

We think it is not really necessary to cite cases beyond this jurisdiction to arrive at the law on this subject.

The rules applicable to the present case seem to be well-stated in the following points of the syllabus in a prior case:

"Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed.

"The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration." *Spiegal & Son v. Alpirn,* 107 Neb. 233, 185 N. W. 415.

This case was followed, and similar rules announced, in *Weidenfeld v. Olson,* 132 Neb. 303, 271 N. W. 806.

In *Hartman v. Lipovsky,* 122 Neb. 823, 241 N. W. 563, parol evidence was held admissible, but the rule carefully stated the exception applicable to a case such as the present one: "The true facts as to the consideration, or a part thereof, named in a written contract can be varied by parol evidence, when it is merely a recitation of fact and not contractual or promissory in its nature."

In a very recent case we held: "When the consideration of a contract is promissory or contractual in its nature, it cannot be varied by parol agreement." *Chalupnik v. Brant,* 134 Neb. 465, 279 N. W. 159. The opinion cites 4 Neb. Law Bulletin, 132, sec. 10. Section 11, on page 134, of that article, treats of deeds and says: "In so far as a deed is deemed to be contractual, it is subject to the parol evidence rule the same as any other contract."

The deed here contained a very complete contract for the

support of the mother. It was in no way ambiguous or contradictory. There was shown no fraud in its procurement. It was delivered and recorded and the daughter had it in her possession among her private papers for seven years before she even questioned it. True, she now says she did not read it during that period. When probate of her mother's estate was commenced, she sought to be appointed executrix and, as we gather from the record, was first appointed to that position. Before she was appointed the county judge asked her, as he testified in this case, if she had any claim against her mother's estate and she answered in the negative. That was on September 11, 1935, three years after she admitted she had read the deed. She was thereupon appointed sole executrix, but when she produced this claim she was superseded by her brother, the present executor. She will not now be heard to say that she did not read the deed and did not know its contents. She may not have realized the legal effect of the contract for her mother's support, but if she made an improvident contract it cannot be cured by the courts; the matter should have been taken care of by a mutual contract between herself and her mother during the lifetime of the mother. The courts cannot make or recognize any contract for the parties; the parties are bound by the contract which they made in writing themselves.

We are of the opinion the trial court erred in admitting oral testimony of another or different contract than that contained in the deed, and erred in submitting the case to the jury. We think the executor was entitled to a judgment.

For the reasons stated, the judgment is reversed and the district court is directed to cause judgment to be entered for the executor of the estate.

REVERSED.

MARY B. MCDONALD, APPELLEE, V. MASONIC TEMPLE CRAFT OF NORTH PLATTE, TRUSTEE, ET AL., APPELLANTS: COUNTY OF LINCOLN ET AL., APPELLEES.
280 N. W. 275

FILED JUNE 17, 1938. No. 29987.

1. **Taxation.** Any state, county or city general tax is void upon any property exempt from taxation.
2. ———. "A tax levied upon property that is exempt from taxation is one levied for an unauthorized purpose, within the meaning of section 77-2115, Comp. St. 1929, and the collection of the tax may be enjoined." *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln,* 131 Neb. 379, 268 N. W. 91.
3. ———. Where a tax is levied upon property as a whole, and a part is exempt under the Constitution and the statutes, the assessment, if inseparable, is unauthorized and the whole tax is void.
4. ———. A tax is void when assessed and levied upon an aggregate valuation of exempt and nonexempt property.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. Opinion on motion for rehearing of case reported in 133 Neb. 589. *Former opinion vacated and judgment of the district court reversed, with directions to dismiss.*

Hoagland, Carr & Hoagland, for appellants.

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellee McDonald.

R. H. Beatty and *S. S. Diedrichs,* for appellees County of Lincoln *et al.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is a suit to foreclose a tax lien against the real estate of the Masonic Temple Craft of North Platte. The trial court decreed a foreclosure and upon appeal to this court an opinion was adopted generally affirming the judgment. *McDonald v. Masonic Temple Craft,* 133 Neb. 589, 276 N. W. 176. On a motion for rehearing another argu-

ment was requested by the court, and the appeal was reconsidered after briefs and comprehensive rearguments of the parties.

The situation set out more comprehensively in former opinions of this court is briefly that the Temple Craft for the Masonic bodies owned this property prior to 1929, and while it was occupied by a two-story building, the first floor was used for commercial purposes and the second floor for lodge purposes. In 1929 the first floor was vacated, except for a small shoe shining parlor, and about March of said year the building was razed and the present new four-story building was completed in December, 1929. In 1929 taxes were levied and assessed upon the property, and, not being paid, the property was advertised and sold for delinquent taxes on November 3, 1930, to Mary B. McDonald. Subsequent taxes were paid by her for the years 1930, 1931, 1932, 1933, and the first half of 1934.

As stated in our previous opinion in this case, the first action taken by the Masonic Temple Craft was in August, 1930, when it applied to the board of equalization to have the property exempted from taxation. The county board had adjourned *sine die* as a board of equalization, but later, September 20, denied the application. An appeal was taken to the district court which was dismissed for want of jurisdiction. The facts were in dispute as to whether the county board was sitting as a board of equalization, but the decree of dismissal became final because no appeal was ever taken. However, this protracted litigation really had its inception in this court when the appellant joined with the Independent Order of Odd Fellows and the Benevolent and Protective Order of Elks in an appeal from the board of equalization for Lincoln county in an effort to have that part of their respective buildings which was used for lodge purposes exclusively exempted from taxation. That case, *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841, 252 N. W. 313, was reversed because of an improper attempt to try the case on a stipulation of facts. The case was retried, and on appeal we held that 35 per

cent. of the building and 50 per cent. of the lot were used for other than lodge purposes, and subject to assessment on that basis. *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, 261 N. W. 569. Subsequently we modified our opinion and held that the real estate on which the building stood should be assessed on the same proportion as the building, to wit, 35 per cent. *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 827, 263 N. W. 150. The district court thereupon entered a decree in part as follows: "The court further finds that the assessments for taxation made by the board of equalization of Lincoln county, Nebraska, for the year 1931 were for said entire property as one entity, including that part of said property which was exempt from taxation, and that said assessments were illegal; that said county board failed to exempt from taxation that part of said property which was exempt from taxation and failed to make an assessment for taxation purposes on that part which was subject to taxation, and that said board of equalization of Lincoln county, Nebraska, the defendant herein, *should be required to set aside its assessments and levies made upon said property for the year 1931.*" (Italics ours.) The court thereafter in said decree set aside the assessment of the property and the levy of the tax. *This decree was not appealed from.* This decree was entered by the district court pursuant to a mandate of this court. The claim of plaintiff is based in part upon the subsequent taxes paid for 1931, 1932, 1933, and the first half of 1934. It is hard to determine from the record whether the taxes for 1932 to 1934, inclusive, were definitely set aside as held by the court. There was objection made to the board of equalization, and the court held the extent to which said property was taxable. The claim of the appellee is based at least in part on taxes assessed and levied for 1931 which were set aside by the decree of the district court.

While not passing upon the question definitely because not directly before us, probably the appellee's only remedy is provided by section 77-2054, Comp. St. 1929, as follows:

"Whenever, for any reason, real estate has been sold or shall hereafter be sold for the payment of any tax * * * levied by any county * * * and it shall thereafter be determined by a court of competent jurisdiction that said sale was void, it shall be the duty of said county * * * to hold said purchaser harmless by paying him the amount of the principal paid by him at the sale with interest thereon at the rate of 6 per cent. per annum from the date of sale." This remedy is likely applicable to the other items included in the appellee's claim for which she seeks to foreclose a lien. It is not necessary for us to determine whether the decree was right or wrong, since it became the law of this case. Even if it could be successfully contended that this did not apply to the taxes for 1932 to 1934, inclusive, they are void for the reasons hereafter set out relative to the taxes for 1929 for which the county treasurer issued a certificate of sale, and for the taxes subsequently paid for 1930.

In order that confusion may be prevented, the claim of Mary B. McDonald is based upon a tax sale certificate for the 1929 taxes, and the subsequent taxes paid by her thereafter for the years 1930, 1931, 1932, 1933, and the first half of 1934. In its answer the Masonic Temple Craft denies that any of these taxes for the year 1929 were legally assessed and levied against the premises. It contends that all the property was exempt from taxation, and that the major portion of it was exempt during the years 1930 to 1934, inclusive. It also insists that the district court for Lincoln county, upon appeal from the board of equalization, has directed the taxes for 1931 to 1934, inclusive, to be set aside for these years. There never has been an assessment levied upon the property not exempt as it has been commingled with the exempt part.

This court was formerly of the opinion that this case involved a matter of overvaluation, and that complaint must first be made to the board of equalization. The court, however, after an oral reargument, is now of the opinion that our previous holdings do not permit of this view. There are previous decisions of this court that entertain the view that

a portion of the property is exempt from taxation because it is used for charitable and educational purposes. Even the assessments for the years that have not been set aside by a final order of the district court are not valid in the light of our statutes and adjudicated cases.

Section 77-2115, Comp. St. 1929, provides: "No state, county or city general tax shall be declared void, in whole or in part, except upon a showing that the property in controversy was exempt from taxation, or that the levy was for an illegal or unauthorized purpose." Under this statute any state, county, or city general tax is void upon any property exempt from taxation.

In the instant case the taxes were assessed and levied upon property absolutely exempt under the statute. The board of equalization did not assess and levy taxes exclusively upon property that was not exempt. The total tax was assessed and levied upon the whole property, a portion of which was exempt from such taxation.

Pursuant to the provisions of section 2, art. VIII of the Constitution, our legislature enacted section 77-202, Comp. St. 1929, which provided: "The following property shall be exempt from taxes: * * * property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." The taxes herein involved were assessed and levied upon the property of the appellant by the officials of Lincoln county for general state, county and city purposes. Certain of this property has been held to be exempt from taxation. The part that is exempt is the part used exclusively for lodge purposes, which is the upper two floors, and 65 per cent. of the lot. *Masonic Temple Craft v. Board of Equalization*, 129 Neb. 293, 261 N. W. 569, as modified later on rehearing, 129 Neb. 827, 263 N. W. 150. Since it has already been determined that a portion of the building and a part of the lot are exempt under the statute, we must therefore assume in this case that the major portion of the property is not subject to taxation.

In *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln,* 131 Neb. 379, 268 N. W. 91, this court, in holding a tax upon exempt property to be absolutely void, said: "If the facts alleged in the petition are true,—and for the purposes of this proceeding we must accept them as true,—plaintiff's property was absolutely exempt from taxation for the years in which the taxes were levied. Any tax levied against exempt property is one levied for an unauthorized purpose. Moreover, the city council was without power to levy a tax upon exempt property. It could no more do so than it could levy a tax upon property without the corporate limits of the city. The petition states facts sufficient to warrant the granting of injunctive relief." It was held in that case: "A tax levied upon property that is exempt from taxation is one levied for an unauthorized purpose, within the meaning of section 77-2115, Comp. St. 1929, and the collection of the tax may be enjoined." Applied to this case, the tax against exempt property is for an unauthorized purpose and absolutely void.

In this case the court has held as heretofore delineated that the top two floors and a portion of the lot upon which the building stands are exempt from taxation. This tax was levied on the property as a whole. This court has frequently held that such a tax was void. The rule applicable may be stated that, where a tax is levied upon property as a whole, and a part is exempt under the Constitution and the statutes, the assessment, if inseparable, is unauthorized and the whole tax is void. In an early case in this state it was held: "The levying of a tax is not a judicial act and the court cannot impose, as a condition of relief against a void tax, the payment of such tax as would be lawful, *where new proceedings and a different basis of assessment are necessary to ascertain what tax is lawful.*" (Italics ours.) *Hutchinson v. City of Omaha,* 52 Neb. 345, 72 N. W. 218. This rule is supported by the case of *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln,* 131 Neb. 379, 268 N. W. 91.

An analogous situation is where a tract of land is owned

by two persons and is assessed as a whole. Neither party can determine the amount of the taxes due upon the specific tract. This court held in *Spiech v. Tierney,* 56 Neb. 514, 76 N. W. 1090: "Where land owned by one person is assessed with the land of another, under one aggregate valuation, so that neither owner can determine the amount for which his property is liable, the entire tax is void."

In this case there are two separate entities in so far as taxation is concerned. The Temple Craft owns the first two floors of the building which are rented and used for commercial purposes. These are taxable together with a portion of the lot. It owns the top two floors which are used exclusively for lodge purposes, and are exempt, together with a portion of the lot. This is not, as we at first thought, a matter of overvaluation, but an attempt to tax exempt property. This, we have held, is an unauthorized tax, and void. It is contended by the appellee that the Masonic Temple Craft did not complain before the board of equalization until after the tax for 1929 and 1930 had been assessed and levied. Since this was a void tax, it was not necessary. In *Sioux City Bridge Co. v. Dakota County,* 61 Neb. 75, 84 N. W. 607, this court said: "There is no obligation imposed upon a property owner to appear before the taxing body and complain should it attempt to *assess as a whole property,* part of which is within and part without the territorial limits of the municipality, and that such tax, *being void in part,* because of want of jurisdiction, which jurisdiction it was the duty of the officials to know, *the whole of such assessment is void, unless* the amount of tax assessed against that portion within its jurisdiction can be readily separated from the portion without." (Italics ours.) In *Miller v. City of Lincoln,* 94 Neb. 577, 143 N. W. 921, the rule is expressed in the following language: "Plaintiff being the owner of land known as 'irregular tract 29,' which was crossed by a boulevard of the city, sold and conveyed to the city that part thereof lying on one side of the boulevard. The part sold to the city was thereupon designated as 'lot 78' and plaintiff's tract as 'lot 77.' Taxes were afterwards

assessed against both tracts, jointly described in the assessment as 'lot 29.' The evidence is not definite and exact as to the acreage of either tract, nor as to the relative value thereof. *Held,* that, as it is impossible to ascertain the equitable proportion of the tax chargeable against plaintiff's tract, the assessment is void, and the plaintiff was not required to tender any portion of the tax before bringing his action to cancel the same." See, also, *State v. Several Parcels of Land,* 78 Neb. 703, 111 N. W. 601, which case arose because the city of Plattsmouth levied a tax upon property that was not within the corporate limits. The opinion held: "Such tax is one levied for an 'unauthorized purpose,' within the meaning of section 15 of the scavenger act * * * and may be adjudged void in a proceeding brought under the act." In *East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln, supra,* it is also said: "Moreover, the city council was without power to levy a tax upon exempt property. It could no more do so than it could levy a tax on property without the corporate limits of the city." Consequently, the contention of the appellee that a tender was necessary to avoid the tax is requesting us to require an impossible act in order for the appellant to maintain its rights. Under the Constitution, statutes and adjudicated cases, a tax on exempt property is absolutely void because for an unauthorized purpose, and when the void assessment is so interwoven with an assessment on other property the whole becomes void.

There is an argument in the appellee's brief that the property was not exempt in 1929. Certainly under the evidence at least a portion of it was exempt. The same is true of the tax levied for the year 1930. In order that no confusion arise, the taxes for 1931, 1932, 1933, and the first half of 1934, have been definitely set aside and vacated by a final court order. They are also void because levied upon an aggregate valuation of exempt and nonexempt property. The 1929 tax sale certificate and the subsequent taxes for 1930 are void because partially assessed and levied upon exempt property. There cannot be a valid claim based upon

a void tax. Since there is no claim, it is unnecessary for us to discuss the matter of interest. There can be no interest where the taxes are invalid. A void tax is no tax, and collection cannot be enforced, and a purchaser of such a tax is not entitled to the foreclosure of any lien. In fact, he has nothing except his statutory right to get his money back. This has not been sought in this case and is not presented to the court.

Other problems discussed in the briefs are not before us for solution and are definitely not passed upon. While the main divergence between our present view and that formerly held by us is that the tax was attempted to be levied upon exempt property and previously it was held by us that it was an overvaluation of the property necessary to be first considered by the board of equalization. To avoid confusion the former opinion in *McDonald v. Masonic Temple Craft*, 133 Neb. 589, 276 N. W. 176, is hereby vacated and set aside in its entirety and the case is hereby disposed of on the motion for rehearing. In accordance with this opinion, the judgment is reversed and the cause remanded, with directions to dismiss.

REVERSED.

NORA B. SHEETS, APPELLEE, V. GLENWOOD TELEPHONE COMPANY ET AL., APPELLANTS.
280 N. W. 238

FILED JUNE 17, 1938. No. 30352.

1. **Workmen's Compensation: COMPENSABLE INJURIES.** In order that an injury be compensable under the workmen's compensation law, it must arise out of and in the course of employment.
2. ———: ———. There must be a causal connection between the employment and the injury before a recovery can be allowed on a disability arising out of and in the course of employment.
3. ———: ———. Where an employee deviates from her employment and is injured while engaged in her own business or enjoyment, the injury is not compensable under the workmen's compensation law.

4. ———: ———. The evidence in the record examined and establishes that accident and incidental injuries did not arise out of and in the course of employment.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Chambers, Holland & Locke, for appellants.

Roscoe S. Hewitt and *Glenn L. Mace, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

The first question presented to this court on appeal in this compensation case is whether the employee had a compensable injury. The compensation court denied an award, but on appeal to the district court an award was made.

Nora B. Sheets was employed by the telephone company as the operator at Ayr. Under an arrangement with the company, this small exchange was placed in her home and she was to care for it throughout the day. There was a loud alarm bell on the switchboard which would call her from other parts of the house and even the yard to attend to her duties there.

The question is presented to this court that the claim for compensation was barred by the statute of limitations. It is unnecessary to consider and determine the evidence as to this, however, because it is determined that this was not a compensable injury arising out of and in the course of her employment. The employee herself describes the accident in the following language: "I went out to the back porch to get a drink and also to put some milk or butter into the cooler we both used together. Of course, I knew it wouldn't take long as the board wasn't busy and the alarm was on. When I came back I stumbled or stepped on something and it threw me down and I fell on my hip and broke it." Mrs. Dykeman, a neighbor, was with her at the time, and states that she brought her milk and gave it to her in the kitchen and then started back, stopping at the

well. Ardell Bennett, the daughter of Mrs. Sheets, was also there. The group gathered around the well and put cream, milk and butter in the cooler and got some water in a pail and then each left the pump. When Mrs. Sheets was on the back porch of her home, visiting with her neighbor and daughter, getting a pail of water, and putting milk in the cooler at the well, she was not within the course of her employment. The alarm bell did not sound, calling her back to her duty as an employee of the telephone company, and there is no evidence in the record that she was returning to her duties as telephone operator for the company. Her purpose in going upon the porch was not incidental to any work of the company. The fact that she may have taken a drink while on the porch at the pump does not make her deviation from her duty incidental to her employment under the circumstances of this case. From the nature of her employment and the salary paid, it was not expected that she would work all of the time. It was in the nature of a part time job. It required her continued attention, but not her constant work. She lived in her own home and did the required work. It cannot be said in such a case that every household duty was within the course of her employment or incidental thereto.

It presents a different situation than *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853, where one was held to be injured in the course of his employment who was assaulted by the foreman at the dining table where he was compelled to eat by his contract of employment, and as a part of his compensation. The facts in this case cannot bring it within the rule there announced that the eating of his dinner was incidental to his employment. It would require an unwarranted discussion to distinguish all the cases cited by the appellee, but suffice it to say that the facts of this case do not invoke the rules announced in *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, 193 N. W. 742, where the employee was sharpening tools used in his work during the noon hour; nor of *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N. W. 655, where an employee, a traveling salesman, was

repairing his own automobile so that he could set out on a trip for the employer as was his custom; nor of *Struve v. City of Fremont,* 125 Neb. 463, 250 N. W. 663, where a fire chief was preparing to go to Omaha to attend a school as ordered by the city council. Especial attention has been given *Speas v. Boone County,* 119 Neb. 58, 227 N. W. 87, where an employee was kicked by a horse during the noon hour, while he was feeding his team at his own home. This case was discussed by Chief Justice Goss who wrote it, in *De Porte v. State Furniture Co.,* 129 Neb. 282, 261 N. W. 419, in which he said this case "goes as far as we have ever gone in holding an injury compensable when it did not occur during the time the workman was actually employed at his work, or actually within the area where his work was contracted to be performed and during the period he was employed at his work. But the feeding of his team by Speas was the usual incident of the noon hour and he was injured while preparing to feed them." There was not then, and there is not now, any intention of extending the course of employment so that all accidents suffered by a workman should be within the compensation law as arising from the employment. The legislature did not intend to impose such a liability upon employers, and this court acting within its proper sphere cannot do so. All of the cases called to our attention, including those mentioned, are distinguishable upon the facts. This court is committed to the view that, in order that an injury be compensable under the workmen's compensation law, it must arise out of and in the course of employment. *Suverkrubbe v. Village of Fort Calhoun,* 127 Neb. 472, 256 N. W. 47; *McNaught v. Standard Oil Co.,* 128 Neb. 517, 259 N. W. 517.

A sister state has stated the rule applicable to a situation such as this as, substantially, that there must be a causal connection between the employment and the injury before a recovery can be allowed on a disability arising out of and in the course of employment. *Christensen v. Hauff Bros.,* 193 Ia. 1084, 188 N. W. 851.

The authorities of this and other states support the view

that, where an employee deviates from her employment and is injured while engaged in her own business or employment, the injury is not compensable under the workmen's compensation law. *De Porte v. State Furniture Co., supra; Hammond v. Keim,* 128 Neb. 310, 258 N. W. 478; *McNaught v. Standard Oil Co., supra;* 71 C. J. 678.

The evidence in the record examined and establishes that accident and incidental injuries did not arise out of and in the course of employment.

REVERSED AND DISMISSED.

PAINE, J., dissenting.

Mrs. Sheets had been employed by the telephone company since 1923. She worked at the switchboard when necessary from 6:00 a. m. to 9:00 p. m., and after that she put on the alarm so she would hear it ring at night if she was away from that room, the switchboard being in her home. She had left the switchboard on this Sunday afternoon to get a drink—she may also have put some milk in the cooler—and in going back in the house she fell and broke her hip.

The opinion in this case holds that this accident did not arise out of, or in the course of, her employment. It is a very close question, but for my part I am inclined to take the other view.

Supporting this theory, I might briefly refer to the case of *Racine Rubber Co. v. Industrial Commission,* 165 Wis. 600, 162 N. W. 664, where a factory hand was eating his lunch in the factory and a pile of rubber fell upon him and injured him, and it was held that he was performing a service growing out of and incidental to his employment.

In another Wisconsin case it was said: "Going for a drink in the customary manner is within the rule permitting recovery under the workmen's compensation act for injuries received by an employee doing some act not prohibited and necessary or convenient to his health and comfort." *Widell Co. v. Industrial Commission,* 180 Wis. 179, 192 N. W. 449.

"That truck helper left employer's disabled truck * * * to go after drink of water did not remove him from 'course

of employment.' " *Alabama Concrete Pipe Co. v. Berry,* 226 Ala. 204, 146 So. 271.

In the case of *St. Louis, A. & T. R. Co. v. Welch,* 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839, a member of a railroad bridge gang was injured while sleeping in a bunk car provided by his employer, and the court held as follows: "The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side-track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment and who are injured during the intervals in which the master has no claim upon their services."

In the text of the opinion in *Papinaw v. Grand Trunk R. Co.,* 189 Mich. 441, 155 N. W. 545, it is said: "Here it is shown conclusively that by his contract of hiring deceased was at the time of his death required to be within reach, liable at any time to be called to work upon the track, and in that sense on duty subject to his employer's orders and control."

In *Miller v. Reisch Co.,* 132 Neb. 338, 271 N. W. 853, we held that a ranch employee, who was beaten by his foreman when he was eating his dinner, was engaged in a service growing out of and incidental to his employment.

In *Kirkpatrick v. Chocolate Sales Corporation,* 127 Neb. 604, 256 N. W. 89, an employee was crossing the street to take a taxicab to go to the railway station, and was killed by an automobile, and it was held that he was in some duty incidental to his employment at the time he was injured.

The case of *Speas v. Boone County,* 119 Neb. 58, 227 N. W. 87, is often referred to. In this case a farmer was employed in dragging roads for Boone county, with his own teams, and stopped opposite his own driveway at 11:30

a. m., unhitched the four horses, and while putting his own horses in his own barn to feed them he was kicked and injured by one of them, and the county was held liable for his injury, because it was his duty to feed them.

Other cases in point may be cited: *Favorite v. Kalamazoo State Hospital,* 238 Mich. 566, 214 N. W. 229, where a nurse was injured by a fall in going from the hospital to the nurses' home after her duties were performed for the day; *Parson v. Murphy,* 101 Neb. 542, 163 N. W. 847; *Baade v. Omaha Flour Mills Co.,* 118 Neb. 445, 225 N. W. 117; *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609, 197 N. W. 615; *Struve v. City of Fremont,* 125 Neb. 463, 250 N. W. 663.

This court has held that the workmen's compensation act is one of general interest, not only to the workman and his employer, but as well to the state, and that it should be liberally construed, and that technical refinements of interpretation should not be permitted to defeat it. The act does not contemplate that an employee is a mere machine, required to stay at a particular place. His comfort and safety are committed largely to his own judgment.

Mrs. Sheets was not required to sit at the switchboard all of the time. This accident occurred on Sunday, when there were fewer calls than usual. She stepped out on the back porch to go to a pump and get a drink, which she had a perfect right to do. If the alarm had sounded while she was at the pump, she would have responded instantly. That was a reason why the switchboard was in her home, to save expense.

In the case at bar, Judge Blackledge, the trial judge, found: "The plaintiff while engaged in the performance of her duties as employee of Glenwood Telephone Company, a corporation, on the 30th day of June, 1935, suffered an accident and injury which arose out of and in the course of her employment for the said defendant in Adams county, Nebraska, and is compensable." I am of the opinion that the finding of the district judge that the accident occurred during the course of her employment is amply sustained by the evidence and the authorities cited.

CHARLES H. RICH, APPELLEE, V. C. M. DUGAN ET AL., APPELLANTS.

280 N. W. 225

FILED JUNE 17, 1938. No. 30359.

1. **Master and Servant.** Ordinarily, an employer is liable to a third party for an assault by an employee while acting within the scope of his employment.
2. ———. An act that is incidental to the duties authorized is within the scope of the employment.
3. ———. In determining whether or not the act is incidental to authorized conduct so that it is within the scope of employment, the surrounding facts and circumstances, together with the nature of the employment and the conduct of the employee, will be considered.
4. ———. When an employee authorized to repossess a tractor commits an assault in the accomplishment of that purpose, as in this case, it is incidental to the act authorized and within the scope of his employment so that the employer is liable.
5. **Appeal.** An error is not sufficient ground for reversal unless prejudicial.
6. **Damages.** The verdict in this case is so clearly excessive as to indicate passion and prejudice of the jury.
7. **Appeal.** It is the duty and power of this court to set aside a verdict for damages so large that it does not find support in the evidence.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Cleary, Suhr & Davis, for appellants.

Davis & Vogeltanz, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

DAY, J.

This is an action for damages for injuries resulting from an altercation between Rich and Dugan on April 21, 1936, brought by Rich against Dugan and his employer, the International Harvester Company. Both the employee and the employer appeal from a judgment of $1,475.

The employer insists that it is not liable because the alleged assault was not within the scope of the employment

of Dugan. Ordinarily, an employer is liable to a third party for an assault by an employee while acting within the scope of his employment.

The general rule applicable is in 3 C. J. S. 186, sec. 255. It states that the proper inquiry to determine whether the tort was within the scope of an agent's employment is: "Was the act done in the course of the agency and by virtue of the authority as agent with a view to the principal's business." It cites and quotes from *Rochester-Hall Drug Co. v. Bowden,* 218 Ala. 242, 118 So. 674, as illustrative of a proper test as to whether an act is within the scope of an agent's authority. It is there said: "If an employee is engaged to perform a certain service, whatever he does to that end, or in furtherance of the employment, is deemed by law to be an act done within the scope of the employment. * * * Such conduct, to come within the rule, must not be impelled by motives that are wholly personal, or to gratify his own feelings or resentment, but should be in promotion of the business of his employment."

In Restatement, Agency, sec. 229, the rule is stated as follows: "(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized. (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: * * * (b) The time, place and purpose of the act; * * * (e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; * * * (i) the extent of departure from the normal method of accomplishing an authorized result." Other considerations mentioned in that work are not quoted here because they are not applicable to the facts in our case. However, an interesting comment is made in this work as follows: "An assault by one employed to recapture a chattel, while entirely different from the act which he was employed to do, which was merely to take possession of the

chattel, may be within the scope of employment, unless committed with such violence that it bears no relation to the simple aggression which was reasonably forseeable." Restatement, Agency, sec. 229, comment (b).

Seavey, who succeeded Mechem after his death in 1928, as reporter for the American Law Institute on Agency, and continued the work until publication in 1933, formerly wrote upon this question as follows: "A master is liable for all the acts of a servant performed within the general scope of the servant's authority and for general purpose of serving the master's business. * * * What is within the scope of employment is often a difficult question and can be answered only by reference to the agreement between the parties, the custom of business and the necessities of the occasion. * * * The injured person must prove affirmatively that at the time of the injury the servant was engaged upon the particular occupation for which he was employed. * * * It means that he is liable for results where the employee, in endeavoring to perform an act within the general scope of his employment and doing an act of the general nature for which he is employed, causes injury to a third person. If this is found, the fact that the servant disobeyed orders, made a mistake, or even committed a crime, does not prevent the employer from being liable. He may be liable also even though the employee is guilty of a wilfully wrongful act, performed with the intention of doing harm to a third person, if performed in the course of employment and with some purpose in mind of achieving the general object for which he was employed." 2 Neb. Law Bulletin, 10.

This court has had occasion to consider this question before in a number of cases. In *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, one Allen Ireland was employed to guard certain feed upon the defendants' premises and carelessly shot and killed a third party. A demurrer to the petition was sustained and affirmed by this court, because the petition did not allege that the deceased was molesting the feed, and did not, therefore, come within the scope of

the employment of the servant in guarding the feed. This case supports the view that the employer would not be liable unless the employee had acted to carry out the purpose of his employment.

Crounse v. Booth Fisheries Co., 111 Neb. 6, 195 N. W. 462, recognized the rule heretofore quoted from various authorities, and decided the case upon a question of pleading. In that opinion the court stated: "We are unable to find an allegation that would connect the beating that plaintiff received which would even remotely tend to bring it within the scope of the agent's employment, nor did it come within any duty which he owed to his employer."

Again the question was before the court in *Zaitz v. Drake-Williams-Mount Co.*, 107 Neb. 262, 185 N. W. 424, and the court then said: "It is well settled that, when the act complained of is within the scope of the agent's employment, the master may be liable if the servant performed the act with a view to the service for which he was employed." It was held in that case that the facts did not bring it within the rule, and the court affirmed a verdict directed for the employer.

Not long ago this court held in *LaFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902, that the employer was liable for all employee's acts in the execution of the business within the scope of the employment.

In view of the authorities, we announce the rules of law applicable to this case. An act that is incidental to the duties authorized is within the scope of the employment. In determining whether or not an act is incidental to authorized conduct so that it is within the scope of employment, the surrounding facts and circumstances, together with the nature of the employment and the conduct of the employee, will be considered.

Under the facts in this case as disclosed by the record, Dugan was employed as a collector for the International Harvester Company. He went to Rich's farm about a tractor upon which there was a balance due. Dugan had previously negotiated a settlement of the matter, but the

company had not accepted the proposition. It desired additional security, which Rich was unwilling to give. Dugan proposed to take the tractor, upon which the company already had a chattel mortgage securing its indebtedness. The negotiations between Rich and Dugan had been friendly. Rich proceeded to unfasten a manure spreader which he was using so that the tractor might be driven away. Dugan explained that he had no choice in the matter except to take the tractor. While the evidence is in dispute as to the happenings after the manure spreader and the tractor had been disconnected, it appears that an argument arose as to taking certain articles off the tractor which had been put thereon by Rich. In any event, a fight took place between Rich and Dugan. In this affray Dugan knocked Rich down. After Rich got up and the fight was over, Dugan presented a paper, which is said to have been a bill of sale for the tractor, and Rich signed it. Dugan then drove to another farm and left the tractor at Rich's place for several hours and then returned and told Rich it was too late to remove the tractor that day, and stated he would leave it there until the next day. The fight was incidental to Dugan's attempt to collect or remove the tractor from Rich's farm, and was within the scope of his employment with the International Harvester Company. The assault occurred during the process of removing the tractor, the very reason which caused Dugan to go to Rich's farm in the first place. Immediately after the struggle, he presented a paper for Rich to sign. Rich signed the paper, and later consented that the tractor might remain on the premises over night. The only business of Dugan on the farm was to repossess the tractor, and he was attending to it until after the fight and until after the paper had been signed. The assault was not committed with such violence that it bears no relation to the authorized act. It may be stated as a rule that when an employee authorized to repossess a tractor commits an assault in the accomplishment of the purpose, as in this case, it is incidental to the act authorized and within the scope of his employment so that the employer is liable.

When Dugan called at the farm on the 21st of April he was accompanied by two men, Mr. Mingus and Mr. Kezor, who lived as neighbors not far distant from the home of Rich. The testimony of the affray is given by Rich, by his wife, who was in the house and from the nature of things saw very little, and by Dugan, Mingus and Kezor. Rich testified that Dugan started the trouble, while Dugan, Mingus and Kezor state that Rich was himself the aggressor. The undisputed evidence indicates that they were both rather heated, and that the provocation was at least rather inconsiderable. Because of the conflict in the evidence it is difficult to determine who was the aggressor. The jury, after hearing the evidence, must have determined this matter in favor of Rich. However, it is clear that the unpleasant occurrence took place while Dugan was in the act of repossessing the tractor.

The appellant complains about the admission by the trial court of exhibit 1. This exhibit consists of some six papers, a note and a mortgage signed by Rich to the International Harvester Company, which was tendered in settlement but not accepted by the company, a note renewal report, a carbon copy of a letter written Rich by the company, a report and worksheet belonging to Dugan, and a paper with some figures on it. This statement indicates that the papers were worthless. But they were a part of the transaction because they were handed by Dugan to Rich during the controversy. The appellants were responsible for these papers at the time. These papers were material if they rendered any help in the determination of the controversy. Their admission does not seem to be prejudicial, because the testimony of both parties referred to them and the contents. But it is stated in the appellants' brief that the appellee called unnecessary attention to the blood spots on the exhibit. It is averred that these were referred to and emphasized at frequent occasions. An examination of the exhibit reveals that it is not so gory as to impassion or inflame a jury. There is a small soiled spot on one of the papers that the appellee testifies is blood. The evidence in

the case establishes that there was an altercation, and that as a result Rich's eye was blackened and that his nose bled. Even if the exhibit should have been excluded by the trial court and the ruling was erroneous, this court has long been committed to the view that an error is not sufficient grounds for reversal unless prejudicial. *Holman v. Stull,* 130 Neb. 876, 267 N. W. 149, and other cases on this subject.

Instructions 13, 14 and 15 are said to be erroneous. The appellant International Harvester Company complains particularly about instructions 14 and 15 because they set out the liability of an employer for the wrongful act of his employee. These instructions do not appear to be erroneous, although they are not discussed here because the subject-matter has heretofore been mentioned. Instruction 13 dealt with the subject of self defense, and this also interested the appellant Dugan. An examination of the instructions together with the facts of the case discloses that the instructions are not prejudicially erroneous.

The most serious objection is that the verdict is excessive for the damages resulting from the injuries as disclosed by the evidence. The amount of the judgment was $1,475. The undisputed evidence is that the appellee had a black eye and a bloody nose. There was a physician who testified as an expert as to the injuries he believed were the result of the struggle. While this testimony as to the condition of the nose does sound formidable when described in his technical terms, he does state in his testimony that the condition of the nose can be cured. The nose was alleged to have been pushed out of shape and slightly awry, but the jury could see the nose, and expert testimony as to the shape was not necessary. Dr. Barta also testified that he examined Rich about three days after the occurrence, and then about a week later, and that his nose and eyes were better. He examined the appellee again on September 22, 1937. He testifies as to an impaired vision of the eye, and gives measurements to establish this condition. However, he had never examined the eyes prior to the altercation, and there is no evidence that the vision was more than

temporarily impaired as a direct result of the affray. The appellee was a man fifty-one years of age, and his vision might not be expected to be that of a younger man. After all, the appellants are not liable, except for the damages resulting from the conflict between Rich and Dugan.

Dr. Roy D. Martin, of the Foote Clinic of Hastings, also testified as an expert after an examination of the appellee. He stated that he found no pathological condition in either eye due to a blow. He also stated that the condition of the nose was one found very frequently, and that it was very doubtful if the sore had been caused by a blow in April, 1936. Of course, the jury could judge the credibility of the witnesses, but the most favorable construction of the expert medical testimony does not support a verdict for $1,475. The verdict in this case is so clearly excessive as to indicate passion and prejudice of the jury. It is the duty and power of this court to set aside a verdict for damages so large that it does not find support in the evidence. A remittitur cannot be ordered, because it is impossible to segregate the excess of the amount of damages allowed, and it is necessary that the judgment be reversed and a new trial granted.

REVERSED.

LELA MCCALL, APPELLANT, V. HAMILTON COUNTY FARMERS TELEPHONE ASSOCIATION, APPELLEE.
280 N. W. 254

FILED JUNE 17, 1938. No. 30389.

1. **Workmen's Compensation: APPEAL.** A workmen's compensation case may be heard by stipulation of parties in an appeal from the workmen's compensation court by the district court for any county.
2. **Courts.** A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject-matter is estopped to object thereto afterward.
3. **Workmen's Compensation: BURDEN OF PROOF.** An employee claiming compensation under workmen's compensation statute

has the burden to establish that he suffered injury from an accident arising out of and in the course of his employment.

4. ———. Awards for compensation must be based upon evidence showing that employee incurred disability arising out of and in the course of his employment, and not upon probabilities or possibilities.

5. ———. An injury to an employee must arise out of and in the course of his employment to be compensable.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Clifford L. Rein and *Homer L. Kyle,* for appellant.

Chambers, Holland & Locke, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is a compensation case. It was appealed from the compensation court to the district court for Lancaster county by stipulation.

The appellant (employee) now contends that the district court for Lancaster county was without jurisdiction to review, reverse and set aside the award of the compensation court. The statute provides that the award of the compensation court is conclusive unless reversed or modified on appeal. Comp. St. Supp. 1937, sec. 48-174. The section referred to provides that an aggrieved party may file his petition for review in the district court for the county in which said cause arose. The evidence shows without dispute that the cause of action arose in Hamilton county.

The compensation act is a legislative remedy and is applicable as the legislature directs. The statutes provide: "Upon the written stipulation of the parties in the case the matter may be submitted to the district court of any county in the state either at or during a regular term." But it is said that this proviso applies only where a disaffected party wishes to appeal directly from the award of a single judge of the workmen's compensation court rather than from the rehearing provided by the entire

court. In this case a rehearing was had on application of one of the parties by the compensation court. But section 48-176, Comp. St. Supp. 1937, has this proviso: "Upon the written stipulation of the parties the cause may be heard in any other county in the state, *and in like manner in the district court.*" There would seem to be no doubt but that the legislature authorized that the parties might stipulate for a hearing before the district court for any county in the state. A workmen's compensation case may be heard by stipulation of parties in an appeal from the workmen's compensation court by the district court for any county.

There is another valid reason which prevents the appellant here from questioning the jurisdiction of the district court for Lancaster county. The district court for the various counties of the state generally have been given jurisdiction of appeals from the workmen's compensation court. Even if the legislature had not provided that the parties could stipulate that a district court for a certain county might hear the case, the court has jurisdiction over the subject-matter. The venue is decided under the law by the place in which the cause of action arose. The parties in this case stipulated that the case should be submitted to the district court for Lancaster county. The appellant thus invoked the jurisdiction of the court and asked it to render a judgment. It was not until the motion for rehearing in the district court that she questioned the jurisdiction of the court. At that time she knew the district court had decided against her contention. It was then too late, after an adverse finding, to question the jurisdiction of the court.

A party invoking a court's jurisdiction in a case where the court has jurisdiction of the subject-matter is estopped to object thereto afterward. *In re Estate of Nilson,* 126 Neb. 541, 253 N. W. 675; *City of Enderlin v. Pontiac Township,* 62 N. Dak. 105, 242 N. W. 117; *In re Petition of Farber,* 260 Mich. 652, 245 N. W. 793; *Educational Film Exchanges v. Hansen,* 221 Ia. 1153, 266 N. W. 487. Of course, jurisdiction of the subject-matter is necessary in

such a case. "Jurisdiction of the subject-matter," says the Michigan court, "is conferred by law and cannot be conferred on a court by consent." *Halkes v. Douglas & Lomason Co.*, 267 Mich. 600, 255 N. W. 343. Another court holds: "Jurisdiction of subject-matter cannot arise from consent or submission of parties." *O'Neal v. Diamond A Cattle Co.*, 63 S. Dak. 481, 260 N. W. 836. The Wisconsin court, in an opinion written recently by Chief Justice Rosenberry, held that the parties cannot confer jurisdiction upon a court where the court has no jurisdiction of the subject-matter. *Estate of George*, 225 Wis. 258, 274 N. W. 294, vacating mandate, 225 Wis. 251, 270 N. W. 538.

Having considered the jurisdictional question, the merits of the case will now be considered. The employee in the case was a telephone operator for the appellee. There were about nine operators employed at the exchange. In order to recover, the employee must allege and prove that she was injured in an accident. The workmen's compensation law defines "accident" as used therein as follows: "The word 'accident' as used in this act, shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected * * * event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Comp. St. Supp. 1937, sec. 48-152.

The section of the statute above cited also provides: "The said terms shall in no case be construed to include occupational disease in any form, except occupational diseases which arise out of and during the course of employment and are peculiar to the smelting, metal refining, or battery manufacturing industries, and which are contracted by workmen employed in said industries, and disability commencing during the period of employment, or disability commencing within two years subsequent to the termination of said employment, and occupational diseases contracted in these industries shall be included in said terms. Said terms shall not be construed to include any contagious or infectious disease contracted during the course of em-

ployment, or death due to natural causes, but occurring while the workman is at work."

The employee herself, as a witness, testified that on February 8, 1936, while she was working as an operator, she was taken with a violent pain in her ears and had to go home. She describes the nature of her disability in the following language: "My ears started to run and pain and then they started to scab and itched. And they just kept getting worse and finally I went to a doctor." The physicians who testified in this case are agreed upon the fact that the employee had and still has eczema. She continued to work, except for intermittent intervals when she was necessarily off, until her services were terminated by the company about August 6 of the same year, and she made a formal claim for compensation about November 30 of that year.

Is there sufficient evidence in the record to establish that the employee in the course of and arising out of her employment with the defendant was accidentally injured? The employee was one of nine or ten who performed similar work. No other employee contracted the disease. The appellant never had contracted it before, although she had worked at similar employment for about seventeen years, and never knew of any other similar employee contracting said disease. She was dismissed from the employment of the appellee about August 6, 1936, yet at the time of trial in the compensation court, July 21, 1937, she continued to be afflicted in the same manner.

It was stipulated by the parties that the physicians should send in statements and they would be received. In accordance with this agreement three physicians' statements were received as evidence in the record. As stated before, all three agree that the employee had and now has eczema. The statements of two physicians are very guarded and do not state definitely that her work and the use of the head set caused the condition.

Dr. Wengert states that from the history of the case it is his opinion that she contracted this condition from un-

clean head sets used by her in the performance of her duties.

Dr. Arthur L. Smith states in his history of the case: "She received an infection from an unsterilized head set which she was using. * * * If her history is true, the conditions above mentioned are due to the unsterilized head sets used by her as a telephone operator."

Dr. John Peterson states that she has chronic eczema, and agrees with the others that the head set rubbing her skin would irritate the condition. He further states that the supposed offending substance has been removed for nearly a year, and yet the condition persists. He says that she has a "chronic dermatitis," or eczema, of a very moderate degree in both ears, the cause of which is unknown at present.

None of the physicians states that he has ever examined the head set or a similar one, and that it is the cause of the trouble. The statement that it is the cause of the condition is the mere suspicion or speculation of the appellant. She states now, as she stated to the doctors in her history to them, that the head set is the cause. This court is firmly committed to the doctrine that the burden of proof is upon the employee to prove that the accident which caused the disability occurred in the course of her employment. Suspicion and speculation do not present sufficient cause upon which to base an award under the workmen's compensation act.

An employee claiming compensation under the workmen's compensation statute has the burden of establishing that he suffered injury from an accident arising out of and in the course of his employment. Awards for compensation must be based upon evidence showing that employee incurred disability arising out of and in the course of his employment, and not upon probabilities or possibilities. *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425; *Dehn v. Kitchen*, 54 N. Dak. 199, 209 N. W. 364. An injury to an employee must arise out of and in the course of his employment to be compensable. Comp. St.

1929, sec. 48-101; *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419.

Eczema, state the medical authorities in this case, is a skin disease due to individual sensitiveness to some irritant, and the irritating substance is something which the plaintiff in this case is using, eating, or wearing at the present time. It is not an infection, as that term is generally used, and its causes are varied, numerous, and usually complex. It is not usually coupled with an accident, and is not in the present case except by the simple contraction of the condition. Section 48-152, Comp. St. Supp. 1937, in stating definition says: "The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom."

Another authority says that eczema is a nonmicrobic inflammation of the skin. The head set, therefore, could not have had eczema germs upon it. If the head set had been unsterilized, as testified by the employee, it would not have caused the eczema under the evidence in this case. In view of the insufficiency of the evidence to establish that, there is no necessity to examine the case in detail relating to eczema or infection. Since we have determined that the evidence is insufficient to support an award, it is immaterial whether the statute of limitations has barred the action. The evidence as to this is in dispute, and no good purpose to the bench and bar could be served by a discussion of the evidence in this case. There is no apparent error in the record.

AFFIRMED.

IN RE ESTATE OF LAWRENCE VOHLAND. KATHERINE KIRK ET AL., APPELLANTS, V. WALTER VOHLAND, EXECUTOR, APPELLEE.

280 N. W. 241

FILED JUNE 17, 1938. No. 30368.

1. Wills. When an executor is directed in a will to provide a comfortable living and all the comforts of life for the widow, he may expend such sums as, in his judgment, may be necessary, without first securing an order of the probate court in relation thereto; for courts only act in such matters when the executor-trustee abuses his discretion, or acts in bad faith.
2. Trusts. The manner in which a trustee shall exercise his function rests ordinarily within his own discretion and judgment. If he exceeds his powers, acts negligently, or abuses his discretion, courts can grant relief.
3. ———. The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

O. A. Drake, for appellants.

Minor & Minor, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is an action for an accounting, brought by twelve heirs of Lawrence Vohland against the executor of his estate. The district court approved the questioned reports as right and proper, and set aside the order of the probate court removing said executor and appointing a successor, and continued such executor in office. The heirs appealed.

The petition filed in the district court by the twelve heirs, devisees and legatees under the will of Lawrence Vohland, alleged that the widow, Mary Vohland, had not been provided with a comfortable living and all of the comforts of life to which she was entitled by a son, Walter Vohland,

the executor of said estate; that in the reports filed in the county court by the executor he reported having paid to the widow $4,240, and the petitioners deny that he paid out the same, and further charged that any sums paid out by the executor were paid out without any order or permission of the county court, and were improperly and unlawfully paid out; that the executor failed to charge himself with the proper and reasonable rent for the use of approximately 240 acres of the best land of the estate, which he had been using for eight years, from 1929 to 1936, and that there is due to the estate $1,200 additional rent in addition to that set out in his report; that the executor has allowed the taxes upon the real estate of the estate to become delinquent in a sum in excess of $2,300, and a decree of foreclosure has been rendered in the district court thereon. The prayer of said petition is that the executor be cited before the court and examined under oath, and removed as executor, and some other person appointed to act as administrator, and that upon an accounting the said executor be at once required to pay in the amount due from him, and that he be required to turn over all unadministered assets in said estate, and, if said executor does not pay such sums as found due, that the newly-appointed administrator with will annexed be directed to bring action upon the official bond of such executor.

The executor, for answer to the petition, denies every material fact not admitted; alleges that he is the son of the late Lawrence Vohland, who died November 21, 1928, testate, in Buffalo county. The last will and testament of said deceased is set out in full as a part of the executor's answer.

Such will was executed August 17, 1925, in the presence of Everett L. Randall and John A. Miller, and provides: "I direct that Walter Vohland, my executor, shall keep all of my property together until after the death of my wife, Mary Vohland; that he shall provide for her a comfortable living and all the comforts of life to which she would be entitled, or which she would be provided if I were still liv-

ing, and at her death to provide her with a suitable and respectable burial."

It further provides that after the death of his wife the executor shall sell and convert all of his estate into money, and shall pay to three of the children $300 each, and shall pay to the other nine children, the executor being one of the nine, the sum of $1,000 each, and to the children of a deceased daughter the sum of $1,000, and if any surplus remains of the estate that the executor shall then divide the remainder equally between all of the heirs.

In said answer it is further alleged that the widow has continued to live in the home place since the death of her husband, which home is located on a tract of some 43 acres, the barns and other improvements used in connection therewith being located upon a tract of 185 acres immediately across the road therefrom, and that in this property the widow has a homestead right of 160 acres. In addition to the land above described, there were an additional 160 acres of land belonging to the estate, all of said land lying in Buffalo county.

The answer states that the executor and his family have made a home for the mother in the original family home, and that he has leased such land as he did not use himself, for the usual rentals charged in that vicinity, and has accounted for all of the rentals in his reports; that the widow is 85 years of age, and the executor's wife, Clara, has given every attention by providing the widow with a comfortable home, and has served her meals when and where she desired.

It is further alleged in said answer that defendant has made payments to the widow of the deceased of $4,240 from 1929 to 1936, and that such amounts were reasonable and not excessive in carrying out the terms of the will; that because of drouth and short crops the executor has not been able to pay all of the taxes on the real estate belonging to the estate, but has paid the sum of $900 on such delinquent taxes since this suit was started, and will materially reduce the amount due for unpaid taxes from the rentals;

that the widow has sustained a broken hip as the result of a fall and requires constant attention. The executor therefore prays that the court will find that his discharge as executor by the probate court was wrong, and that the district court will find that he has accounted for all funds of the estate, and has not paid excessive amounts for the care and maintenance of the widow.

To this answer a reply was filed, denying all new matter alleged therein, and setting out facts claimed to be established by the evidence taken in the county court in said litigation.

The plaintiffs set out some seven assignments of error, alleging that the trial court erred in failing to affirm, reverse, or in any manner recognize the order of June 23, 1937, made in the county court, and from which the appeal had been taken. It is charged that the trial court erred in refusing to find that the executor should be removed from office for allowing the taxes to become delinquent, and erred also in crediting the executor with $4,240, claimed to be paid to the widow, without receiving any permission or any order of the county court authorizing the same, and in failing to find that this was sufficient cause for removing the executor, and in finding that the executor was a proper person to continue to act in that capacity; that the trial court erred in construing the terms of the last will, which had not been introduced in evidence before the court. The plaintiffs insist that the reversal of a judgment of the probate court removing an executor does not operate to reinstate the executor, and cite section 30-1412, Comp. St. 1929, as setting out the duties and liabilities of an executor. The plaintiffs also cite section 30-309 and section 30-407, Comp. St. 1929, providing for the grounds of removal when the executor is charged with conversion of the property of an estate.

This case is based largely upon the handling of the funds collected for the estate and the expenditures made by the executor. We have, therefore, examined with some care the eight reports filed.

The executor's first report, filed September 24, 1930, covers the period from December 21, 1928, to the date of the report, and itemized 20 items of receipt, amounting to $3,119.02, and 37 items of expenditure, amounting to $3,-108.05, leaving a balance on hand of $10.97.

His second report covers the period from September 21, 1930, to October 13, 1931, and was filed October 19, 1931, and covers 13 items of receipt and $10.97 on hand, making a total of $2,162.03, and itemizes 44 items of expenditure, which with the balance on hand of $32.07 amounts to $2,-162.03.

His third report, filed in the county court on December 23, 1932, covers the period from October 14, 1931, to December 22, 1932, and itemizes 13 items of receipt, which amount to $1,461.73, and itemizes 37 items of expenditure, amounting to $1,404.75, leaving a balance on hand of $56.98.

His fourth report to the county court as executor covered the period from December 20, 1932, to September 27, 1933, with 10 items of receipt, which with the $56.98 on hand made a total of $449.54, and he then lists 24 items of expenditure, amounting to $342.46, leaving a balance on hand of $107.08.

The fifth report of the executor to the county court covers the period from September 27, 1933, to October 25, 1934, and was filed on October 26, 1934. It lists nine items of receipt, which with the balance on hand of $107.08 make a total of $1,013.12, and lists 33 items of expenditure, amounting to $758.60, leaving a balance on hand of $254.52. Among the items in this report are several items paid to the Mary Lanning Hospital at Hastings and nurses and doctors for the widow.

In the sixth report, filed by the executor on December 30, 1935, there are listed 12 items of receipt, which with the $254.52 on hand make a total of $1,299.27. There are listed 35 items of expenditure, amounting to $877.39, leaving a balance on hand in the Exchange Bank of Gibbon of $421.88.

The seventh report, filed by the executor on February 10, 1937, covers the period from December 26, 1935, to

January 5, 1937, there being 12 items of receipt, which with the $421.88 balance make a total of $1,592.61, and there is listed an entire page of expenditures, amounting to $844.80, leaving on hand a balance of $747.81.

The eighth report of the executor, which was filed May 19, 1937, covers the period from February 4, 1937, to May 19, 1937, with eight items of receipt, which with the balance of $746.71 make a total of $1,489.12. There are listed twelve items of expenditure, amounting to $286.77, leaving on hand a balance of $1,202.35.

We find attached to each of these eight reports large numbers of vouchers, covering items as small as 15 cents, together with bank checks, bank statements, and receipts, including tax receipts, and while we have not checked each voucher with each line in the report, yet we find that a careful effort has been made to present to the court all of the facts available about every item of receipt and expenditure.

Exhibit No. 40, received in evidence, is the order of the county judge, entered June 23, 1937, setting out the objections made to these eight reports in the county court, and the petition filed by the heirs, and the finding that the executor has filed eight reports and properly charged himself with rentals collected by himself from the land of the estate up to and including the year ending March 1, 1937, to which finding the heirs except. The court further finds that as such executor he has credited himself in such reports with $4,240, exclusive of payment for hospital, doctors, nurses, and medicine, and finding that the executor is entitled to a credit of only $30 a month for the care, support, and maintenance and living expenses of the widow for eight years and seven months, or a total of $3,090, which sum should be credited upon the reports of the executor, leaving an excess of $1,150 credited by the executor, which trust fund has been improperly paid out; that the executor failed to pay the taxes on the property of the estate, and suffered a tax foreclosure decree to be entered, and that the executor is incapable and unsuitable to further act as executor, and should be removed from his trust,

and E. G. Tunks was appointed as administrator with will annexed, and was directed to collect such sums from the former executor, and upon failure to pay the same the said Tunks shall bring action on the official bond of the executor.

We will first consider the question whether the executor had the right to pay to the widow sufficient sums to provide her with a comfortable living, as directed in the will, without applying to the county court for permission to make such payments.

The testimony of the widow herself is of considerable importance in reaching a proper conclusion on this matter. The evidence of Mary Vohland, the widow, was taken in the form of a deposition on October 8, 1937, at her farm home, and she disclosed that they homesteaded a piece of land in 1878, and lived in a sod house at first, and bought an adjoining piece, and she has lived on this farm ever since. She testified that she had been sick a great deal; that she had been in a hospital at Hastings, where she had a cataract taken off from an eye; that she had had kidney trouble for a long time, and had been in a hospital at Kearney and Omaha with that trouble. She testified that she had two little rooms, where she could be by herself when she wanted to be; that she had purchased a radio, and that the expense of keeping up the batteries to run it was considerable, but she enjoyed it; that she goes in and visits the family of Walter, the executor, and his wife Clara whenever she wants to; that she is very happy with her grandchildren there, and the children always treat her nicely, and come to her room and sing in the evening, and she sings to them in German; that she likes all of her children; that she gives her grandchildren money to go to the movies and for other things when she wants to; that she has at times loaned money to Walter and to Clara, and that they have always paid it back.

The widow stated in one answer that she broke her leg not long ago, and that she had to have special nurses in the hospital, and that "they take it pretty easy," but when

they brought her home Clara took care of her and was with her day and night, and was a better nurse, and she insisted in a number of answers that her daughter-in-law, Clara, was "a very good girl" to her and made her very happy. She said that when the others cashed checks for her they brought the money home to her, and that she is sure that she got all of the money; that her son Walter, the executor, as well as her other children, had all been honest children all their lives. She disclosed in her evidence that she is a devout member of the Mormon church; that she has visited the Temple in Utah three times since her husband died. As to the money that she gives the church, she said that the church wants $10 out of every $100, as they just want the tithe.

She insists that her husband said in his will that she was to have a comfortable living, and that is what Walter had given her, although she could not tell just how many dollars he had given her, and her memory failed on ages of her grandchildren and some other matters.

The testimony of the heirs contesting the matter is that the widow is very frugal, and uses very little money for her own living and maintenance. Dorothy Vohland fixes the amount at $5 a week. Bena Zimmerman Lippincott fixes the amount at $3 a week. Katherine Kirk fixes the amount at $3.50 a week. Lulu Winchester fixed the amount at from $4 to $5 a week. Kate Stierley, an entirely disinterested witness, who had lived in the home a couple of weeks, fixed the amount at $4 a week. Nellie Christensen, who was visited by Mary Vohland when on her trips to Utah, testified that the cost of her railroad fare was about the only expense of those trips.

The plaintiffs insist that the executor has used funds of the estate for his own personal benefit; however, the trial court did not find that the evidence supported this charge.

Let us examine the law in relation to the facts of the case.

"Courts may act when trustees abuse their discretion, or act in bad faith, but not otherwise." *In re Raplee's Will*, 160 Misc. 615, 290 N. Y. Supp. 517.

"Trustees are not entitled to instructions with reference to questions relating to the administration of a trust where trustees are authorized to exercise their discretion with reference thereto." *In re Emmons' Will,* 165 Misc. 192, 300 N. Y. Supp. 580.

"The life beneficiaries are given no power by the terms of the will creating the trust to interfere with the trustee in the administration of its trust, and the law gives them no such power. The manner in which a trustee shall exercise his function rests ordinarily within his discretion. If he exceeds his powers, acts negligently, or abuses his discretion, a beneficiary injured thereby may have redress, but a beneficiary has no power to control the action of the trustee." *City Bank Farmers Trust Co. v. Smith,* 263 N. Y. 292, 189 N. E. 222, 93 A. L. R. 598.

"Generally, trustee is bound by terms of trust, and equity has no right to authorize trustee to depart therefrom, but equity in its capacity as universal trustee may, for preservation of trust estate, * * * direct trustees to do acts which under terms of trust and ordinary circumstances they would have no power to do." *Seigle v. First Nat. Co.* (1936) 338 Mo. 417, 90 S. W. (2d) 776.

In a very recent decision, rendered by Judge Stone in the United States circuit court for the eighth district on October 5, 1937, *Rollins v. Helvering,* 92 Fed. (2d) 390, it is said:

"Discretion lodged in a trustee is rarely a permit to act arbitrarily, but is usually confined to exercise of judgment not unreasonable in light of purposes of trust and of circumstances in which discretion is to be exercised.

"The power of equity to control administration of trust in accordance with grantor's purposes exists solely for protection of grantor's and beneficiaries' right, and there is no public interest in the matter where parties to trust are purely private parties."

The trial court must have found that the allegation of the plaintiffs in their petition, "That the widow, Mary Vohland, has not been provided with a comfortable living

and all of the comforts of life to which she is entitled or that she would have been provided if the said Lawrence Vohland, deceased, were now living," was not supported by the evidence, for he found all of the payments made by the executor right and proper, and that he should be continued as executor, and that the order of the probate court appointing a successor should be set aside.

In the case at bar, there is no question but what the provisions of the will cited gave the executor unlimited power and discretion to care for the widow in sickness and in health, and it has been said by our court that "Courts are always reluctant to interfere with the exercise of a discretion lodged in a trustee," but, on the other hand, are always ready to correct an abuse of discretion. *Roats v. Roats,* 128 Neb. 194, 258 N. W. 264.

This holding of our court is in line with the discussion of this subject of abuse of discretion found in Restatement, Trusts, sec. 187, comment (e), in which it is said: "The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee."

Finding no prejudicial error in the record, the judgment and decree of the trial court is hereby

AFFIRMED.

ENID M. RANKIN, APPELLANT, V. J. L. BRANDEIS & SONS, APPELLEE.

280 N. W. 260

FILED JUNE 17, 1938. No. 30335.

1. Trial: MOTION FOR DIRECTED VERDICT. "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the

facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.

2. Negligence. Evidence examined, and *held* to bring this cause within the doctrine of actionable negligence and to warrant submission of the cause to the jury.
3. ———. "The proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose." *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811.
4. ———. "The mere fact that an invitee falls on the floor of a salesroom or store does not of itself raise a presumption of negligence on part of the owner. But, on the other hand, what constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration." *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Foster & Yates, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

MESSMORE, J.

Plaintiff brought this action against defendant for damages on account of falling on the floor in defendant's store. At the conclusion of plaintiff's testimony, defendant moved for a directed verdict which was sustained. Plaintiff appeals.

Plaintiff's petition alleges, in substance, that on or about May 18, 1936, between 9:30 and 10 a. m., plaintiff entered the first floor of defendant's store in Omaha through the south door of the Sixteenth street entrance, for the purpose of transacting business in the store; that she proceeded through one of the main aisles, running east and west, until she reached the third aisle, running north and south, when she attempted to go south in an effort to reach the elevators, which are on the south side of the east part

of the main floor; that, while she was in the exercise of due care on her part, plaintiff suddenly slipped on water and soap, negligently and carelessly left by defendant on the tiled floor, and was injured; that such negligence was the proximate cause of plaintiff's injury. She alleged further that defendant failed to warn plaintiff of the dangerous condition of the tiled floor, and failed to keep the tiled floor in a clean and safe condition, when defendant knew, or in the exercise of reasonable care should have known, that the condition of the tiled floor was likely to cause the plaintiff to slip and fall. The defendant's answer was a general denial, and alleged that any injuries sustained by plaintiff were due to her negligence, which was more than slight. The reply was a general denial.

The pertinent facts follow: Plaintiff, on May 18, 1936, entered defendant's store in the manner as hereinbefore stated in her petition, at about 9:30 a. m., or shortly thereafter. Her purpose was to shop. Just as she reached a certain aisle near the elevators, as described in her petition, her feet went from under her and she fell on the floor on her left side. She testified: "Well, the whole left side; I just went clear down, and my ankle was clear under me, and my knee and my hip, I hit back here on my shoulder; I just went right down." She was helped to her feet and leaned against a counter until a chair was obtained, and she was helped down into the chair. She looked at the aisle in front of her and saw soapy water on the floor. In describing the size of the spot of soapy water, she testified: "Well, I could not measure it, but I would say it was about the size,—oh, better than my hand; maybe a small plate. * * * Q. Approximately three or four inches or six inches in diameter, something like that? A. I would say just about the size of a small plate; I could not be any more exact than that." A floorwalker came up at that time, stood across from plaintiff and to her right, and ordered a clerk to send for a nurse and a wheel chair. When the nurse and wheel chair arrived, plaintiff was put in the chair and taken to the emergency room in another part of the store.

She testified that the floorwalker took care of the situation, and when he came over to the place where the plaintiff had fallen he turned to another clerk and said: "What is that water doing on the floor, clean it up at once." This statement was denied by the floorwalker. The floorwalker testified that the floors were scrubbed usually early in the morning and previously had been scrubbed in the nighttime, and that the scrubbing of the floors was completed before the opening of the store at 9 o'clock in the morning; that he called a nurse. Plaintiff's husband, who arrived shortly after the accident, found the plaintiff in the emergency room and in an hysterical condition. He testified that he examined the aisle of the store where the accident had taken place, and that he found nothing; that the floor was bare and dry. He had examined his wife's shoes and testified that "they were still damp, on the left shoe, on the outside near the heel. * * * I found they were damp, and it was an oily, watery substance; * * * I found the same type of oily substance that you have in soapy water. * * * Q. Was there any marks on the shoe? A. Just the scuff marks from the sliding."

The sole question presented by this appeal is whether there was sufficient evidence of negligence on the part of the defendant to require submission of the cause to the jury.

The duty of a proprietor of a store to invitees is well stated in *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811: "We are committed to the view that the proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose"—citing *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190; *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, 241 N. W. 565.

In the case of *Wine v. Newcomb, Endicott & Co.*, 203 Mich. 445, 169 N. W. 832, it was said: "As a general proposition, a customer in such a place (a department store) has the right to rely upon the safety of passage along pas-

sageways used by customers. *Brown v. Stevens,* 136 Mich. 311; *Bloomer v. Snellenburg,* 221 Pa. St. 25."

Plaintiff relies on the case of *Glenn v. Grant Co., supra,* wherein the plaintiff fell on an oiled floor which had been oiled by the servants of the defendant company about four days previous to her fall. An employee of the store testified to the condition of the floor and to seeing plaintiff fall. The court said (p. 176): "It would seem that * * * in a salesroom * * * the customer might properly assume that the floor, then open to the general public, was reasonably safe to walk upon and over, and not in a dangerous condition." This case is distinguished from *Broadston v. Beddeo Clothing Co., supra, Thompson v. Young Men's Christian Ass'n, supra,* and *Sokolof v. First Nat. Bank,* 122 Neb. 892, 240 N. W. 547, in that the defendant itself, and no one else, created the condition, while in the other cases cited the defendant had no knowledge, actual or implied, of the dangerous condition claimed to have existed. It was stated further in the opinion (p. 175): "It may also be conceded that the mere fact that an invitee falls on the floor of a salesroom or store does not of itself raise a presumption of negligence on part of the owner. (The above rule was announced in *Broadston v. Beddeo Clothing Co., supra.*) But, on the other hand, what constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration."

Defendant relies principally on the case of *Broadston v. Beddeo Clothing Co., supra.* Aside from the care required of a store proprietor, as herein stated, the court announced the burden of proof in such case as follows: "Where recovery is sought for personal injury sustained by a customer in falling upon a stairway on the ground that the proprietor of the store was negligent in permitting the stairway to be defective in some particular causing the accident, the burden is upon the plaintiff to prove that the defective condition existed and was known to the proprietor before the accident, or that it had existed for so long a time theretofore as to charge the proprietor with notice and to

have afforded him a reasonable opportunity to repair the defect."

In the *Broadston* case, the plaintiff, having business as a customer with the credit manager of the store, was directed to his desk, situated in a gallery about ten feet above the main floor and reached by a stairway. After transacting her business, she turned to descend the stairway and took one step down with her right foot, but, in attempting to take the next step, the heel of her left shoe, she alleged, was twisted in the carpet on the floor of the gallery near the head of the stairway, causing her to trip and fall. The plaintiff recovered in the district court, and the judgment was reversed in this court. Several witnesses for the defendant testified that the carpet on the stairway, extending for a short distance beyond the head of the stairs into the gallery, was practically new, without holes or defects, and was securely tacked down. The court said (p. 607):

"The record in the instant case discloses no evidence either that the carpet was defective before the accident or that any such condition was or could, by any principle of implied notice, have been within the knowledge of the defendant. * * * The utmost that could be inferred from the plaintiff's testimony is that when her heel caught in the carpet a defect then developed, or made itself manifest, that had been theretofore latent or concealed.

"The principle followed by the authorities cited is that, in the absence of actual knowledge of the alleged defect on the part of the proprietor, it must have existed so long before the accident that, if reasonable care had been exercised in inspecting the premises, it would have become apparent, in which event it would have been negligence not to repair it. * * * Her (plaintiff's) evidence, in our opinion, fell short of the proof required to establish negligence on the defendant's part in permitting a carpet which it knew, or by reasonable care would have known, to be defective to remain on the stairway or gallery."

Defendant also cites *Sokolof v. First Nat. Bank*, 122 Neb. 892, 240 N. W. 547, in which the court stated (p. 893):

"There is no evidence that any servant, or other person acting for or on behalf of defendant, placed, or caused to be placed, any soap on the floor of the lobby (the plaintiff had entered the lobby of the bank building and fallen on a wet and soapy floor); neither is there any evidence from which such fact could be reasonably inferred; nor is there any evidence that, if soap was upon the floor, any officer, agent or employee of defendant had any knowledge thereof until the time of the accident."

Defendant cites *Thompson v. Young Men's Christian Ass'n, supra,* wherein the court reaffirmed the law as stated in *Broadston v. Beddeo Clothing Co., supra.* The burden of proof was therein stated: "Where a recovery is sought for personal injury sustained by an invitee in falling upon the steps of a building, on the ground that the owner of that building was negligent in permitting water to accumulate on one of those steps, the burden is upon the plaintiff to prove that said condition existed and was known to the owner before the accident, or that it had existed for so long a time theretofore as to charge the owner with notice and to have afforded him a reasonable opportunity to remove it." The court said (p. 847) that the plaintiff "must prove, unless the evidence shows the condition existed and was known to the association, either that the latter had caused the condition or that it had existed a long enough time prior to the accident to charge its servants with notice to afford them a reasonable opportunity to remedy it. * * * In other words, the association had no knowledge of the water being there, had not itself caused it to be there, and the time that it had been there was too short to charge the association with notice and to afford it a reasonable opportunity to remedy that condition. *Broadston v. Beddeo Clothing Co.,* 104 Neb. 604; *Schnatterer v. Bamberger & Co.,* 81 N. J. Law, 558, 34 L. R. A. n. s. 1077; *Chick v. Gilchrist Co.,* 208 Mass. 183."

Analyzing the evidence, we find that the floors of the defendant's store were generally scrubbed in the early morning by its servants. The scrubbing was completed by

the time the store opened at 9 a. m. Plaintiff stated that a spot of soapy water, about the size of a small plate, was evident at the place where she fell. There would seem to be a connection between such spot of soapy water and the scrubbing of the floor, in relation to time. Apparently, there would be no other way to account for this spot of soapy water or oily substance on the floor. The soapy water would have been on the floor at least from the time that the store opened until the plaintiff entered the store at 9:30 or a little thereafter.

As said in *Glenn v. Grant Co., supra,* generally, "What constitutes due care of an inviter is always determined by the circumstances and conditions surrounding the transaction under consideration." Therefore, it would seem that the employees of a large department store would necessarily ascertain if reasonable care had been exercised in inspecting the premises and whether or not the floors were in a reasonably safe condition for invitees to enter and pass over them in the course of their shopping. Reasonable time is disclosed by the evidence in this case to have elapsed for the agents and servants of the defendant to have had knowledge of the condition of the floor and to have ascertained the facts in respect to the floor.

We believe the evidence shows that at the place where the plaintiff fell there was soapy water. Shortly after the accident plaintiff's husband, in examining plaintiff's shoes, found a soapy and oily substance and scuff marks on the shoes. It is true that the floorwalker stated the place where plaintiff fell was dry, and plaintiff's husband, upon examination, stated it was dry, but such testimony would merely controvert plaintiff's testimony on this issue. The size of the wet spot would, in fact, make it less liable to be seen by the invitee, and, as far as falling was concerned, it would be just as dangerous in a great many respects as a larger spot. There is no doubt that plaintiff received a fall at the place stated, and the manner in which she fell indicates clearly that she must have slipped. Although no one saw her fall, yet she was picked up, placed in a chair, a nurse called, and

plaintiff was taken to the emergency room, and later examined by defendant's physician. The case before us is distinguished from *Broadston v. Beddeo Clothing Co., supra, Thompson v. Young Men's Christian Ass'n, supra,* and other cases cited, in that in the instant case the circumstances point to the fact that the condition complained of was created by the defendant. The facts in this case bring it within the doctrine of actionable negligence. *Glenn v. Grant Co., supra,* and cases therein cited.

This court held in *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence."

Keeping in mind this rule and the reasons given in this opinion, we believe that the facts in the instant case warrant submission of the cause to the jury.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM J. SCHULTZ, ADMINISTRATOR, APPELLANT, V. HENRY BLECKWEHL, APPELLEE.
280 N. W. 257

FILED JUNE 17, 1938. No. 30377.

1. **Principal and Agent.** The burden of proof is on the party alleging agency to establish the same by a preponderance of the evidence.
2. ———. "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement, Agency, sec. 1.
3. **Evidence** examined, and *held* insufficient to prove the allegations

of plaintiff's petition; and order of trial court affirming referee's report and dismissing plaintiff's action *held* not error.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

Cook & Cook and *Ted C. Tow, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

MESSMORE, J.

The administrator of the estate of Catherine Bleckwehl, deceased, brings this action in the district court for Santon county against her surviving husband, Henry Bleckwehl, to require an accounting by him. The pleadings are at great length, but the petition of plaintiff alleges, substantially, that defendant Henry Bleckwehl obtained control of the property of Catherine Bleckwehl, formerly Catherine Schwarting, at the time of his marriage to her, and collected the rents, income and profits from her property, paid off a mortgage on his own land, and that said money was never given to Henry Bleckwehl, but he was permitted to use said money with the understanding that he was more experienced in financial matters, the handling of real estate and the investment of money, and that it would be more convenient and satisfactory for him to take charge of and manage the affairs of his wife. The answer details a general history of the estate left by Catherine Bleckwehl's former husband and an analysis of the financial condition existing from and after the time she became administratrix of her former husband's estate, up to and including the time of her death in 1933. The evidential facts pleaded will be more fully covered in the opinion.

The trial court appointed a referee to hear the evidence and report. The referee filed a report which, in effect, stated that there was insufficient proof on the part of the plaintiff to sustain the allegations of his petition. The administrator then filed objections to the report of the referee,

stating, in substance, that such report failed to set out the facts in reference to an accounting, was insufficient in this behalf, and was composed of legal conclusions drawn from the evidence in the case. The trial court affirmed the report of the referee and dismissed plaintiff's action. The appeal to this court is by the administrator of the estate of Catherine Bleckwehl.

Plaintiff's principal assignments of error are that the court "erred in rendering its judgment of dismissal of plaintiff's action because there is no evidence in the record which is competent to sustain such judgment;" and that the court "erred in disregarding the competent evidence in the record sustaining the claim of plaintiff and that the finding and judgment is not supported by the evidence but is contrary to the decided weight of the competent evidence in favor of plaintiff."

The record discloses that George Schwarting, the first husband of Catherine Bleckwehl, deceased, died in January, 1909, possessed of considerable real and personal property in Cuming county, Nebraska, the inventory of his estate showing 835 acres of land, subject to a 3,000-dollar mortgage. He died intestate leaving his surviving widow Catherine and ten children. His estate was administered in Cuming county. Just prior to his death he had purchased a half section of land in Colorado for $14,400. There remained owing on the purchase price the sum of $11,000. The widow and two of her children went to Dodge, Nebraska, and gave two notes, totaling $11,000, to cover the balance owing on the purchase price, and gave a mortgage on their interest in the inherited property to secure the notes. The widow subsequently obtained a loan of $6,400 on her share of the inherited land, and borrowed from the Howells State Bank the sum of $5,358.90, taking up the notes in July and August of 1909, in amount $11,758.90. She sold the Colorado land in 1917 for $3,520, of which she individually received $1,760, leaving her net loss on this land in the sum of $9,998.90. No claims were filed against the estate of her husband for this amount. She retained

the personal property of her former husband's estate and acknowledged receipt thereof for the minor children, for whom she was appointed guardian. The actual amount of the personal property was $3,440.92. She received actually no money for this amount. Therefore, in 1909 Mrs. Schwarting had obligated herself in the sum of $13,500 with no money to show therefor. On October 29, 1913, she was married to defendant Henry Bleckwehl, who was farming his own 160-acre farm in Stanton county, which land was subject to a 5,000-dollar mortgage. Upon his marriage to Catherine Schwarting, he removed to the farm on which she lived, and there they remained together until December, 1920, when they moved to Anaheim, California.

During the period that the Bleckwehls resided on the Cuming county land, some of defendant's children, together with some of Catherine's children by her former marriage, resided on the farm with them. The sale of defendant's personal property on his farm, when he left to reside on his wife's farm, grossed $4,000. He claimed to have had some money from other sources, in the amount of $2,000, and that in 1915 he paid the mortgage on his land in the sum of $5,000 with his own money. Some of the personal property owned by him he took to the Cuming county farm. He had seven children by a former marriage, and there were seven of the Schwarting children at home at the time the couple were married. The record discloses that defendant contributed to the support of all of the children until some of them left home to be married, or to otherwise follow their own course in life.

November 8, 1915, a judgment in partition was entered in the district court for Cuming county, and the decree of distribution discloses the payment to the adult heirs of their respective shares, and the amount of each minor's share to Catherine Bleckwehl as their guardian. It is also shown that upon reaching majority each child received his or her share of their father's estate, and, in fact, Catherine Bleckwehl paid them interest on the principal. She did charge them for a certain period of time, until her mar-

riage to defendant, for their support and maintenance, as disclosed by her guardianship reports. She became, by virtue of the partition proceedings, the owner of 200 acres of the land, and her husband owned his 160 acres.

At the time they moved to California the rent from this land from the different tenants thereof was put in the Howells State Bank and the Farmers State Bank of Howells, and the funds were intermingled and were the property of both the husband and the wife. The taxes, repairs and all incidentals for the upkeep of the real estate were paid by the bank, and the balance sent to a bank in Anaheim, where the money was used by them for their living expenses. At the time defendant removed to California with his wife he owned his farm and had $12,500 in cash of his own money, and they realized from the farm sale of personal property the sum of $5,700. About $5,800 was invested in a residence in Anaheim and title taken in the name of defendant.

The record discloses certain loans made in 1918 by defendant which he claimed were made by him with his own money, and that such loans were repaid. A trip to Germany is included in the expense, as well as the cost of rebuilding certain buildings on one of the parcels of land, digging of a well and repair of a windmill, amounting in all to about $2,400, and payment of taxes and some other items.

Plaintiff contends that defendant should account to the administrator of Catherine Bleckwehl's estate, and produces records of certain banks to show deposits made in the name of Henry Bleckwehl during the period of his married life with Catherine, and in addition thereto one exhibit, being a lease of certain premises signed by defendant as agent and husband of Catherine Bleckwehl. There is nothing in the record to disclose that defendant was the agent of his wife. The facts, on the contrary, disclose that the couple had lived in harmony, had worked together to rear the families of both, and had used the income from the farms, after their removal to California, to pay their

current expenses, and did not increase the original amounts by investment. Both had the privilege of drawing, and did draw, from the account in the bank, and both, apparently, attended to certain business matters, incident to their own way of managing their affairs. The record is bare of any agreement existing between the husband and wife as to his managing the business affairs of his wife and accounting to her in any particular, or that in any instance he was acting as her agent. The burden is placed upon the plaintiff to prove agency by a preponderance of the evidence. It is well established that a declaration on the part of a party that he is an agent is insufficient to prove agency, and this rule is too well-settled to require discussion.

"(1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement, Agency, sec. 1. Comment on subsection (1) reads:

"a. The relationship of agency is created as the result of conduct by the parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.

"b. It is not necessary that the parties intend to create the legal relationship or to subject themselves to the liabilities which the law imposes upon them as a result of it. On the other hand, there is not necessarily an agency relationship because the parties to a transaction say that there is, or contract that the relationship shall exist, or believe it does exist. Agency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary."

The record in this case fails to establish the relationship of agency between Henry and Catherine Bleckwehl.

It is not necessary in this case to detail the accounting, in view of our holding. Suffice it to say that the total

amount of rents collected from the land owned by Catherine Bleckwehl, during the period from 1920 to 1932, inclusive, was $20,558.65, and after deducting certain expenses, such as taxes, improvements, interest on loan, and payment on principal of loan, there was remaining a balance of $9,537.78, which was transferred to the joint account in the bank at Anaheim. In 1922 one of the minors became of age, and Catherine Bleckwehl used $4,862.16 of her private funds to pay the minor, in order to terminate the guardianship. *Contra* to this evidence is the plaintiff's evidence of the amount of deposits, as reflected by the bank records, and the signed lease wherein the defendant signed as agent and husband of Catherine Bleckwehl, together with the loans made, as described in the evidence.

In view of the evidence, we believe the plaintiff has failed to establish his case by a preponderance thereof. The referee so reported, and the trial judge sustained the referee's findings.

The first proposition of law cited by plaintiff is: "An administrator duly appointed in Nebraska has the authority to proceed in the courts of this state to recover any assets belonging thereto which can be recovered in the courts of this state." This proposition is not controverted but conceded by the defendant.

The second proposition of law cited by plaintiff is: "In a suit against an agent for an accounting it is incumbent to show the agent's receipt of money or property of his principal and its amount and then it is incumbent on the agent to show disbursements were made for the account of the principal and that the same were authorized or accepted by the principal." This second proposition of law would become essential to a disposition of the instant case only after the plaintiff had established by a preponderance of the evidence that the defendant was the agent of his wife, Catherine Bleckwehl, during her lifetime, and in this the plaintiff has failed.

The order of the trial court approving and sustaining the referee's report is

AFFIRMED.

ORRIN L. PLUM, APPELLANT, V. LOUIS J. SIEKMANN ET AL., APPELLEES.

280 N. W. 264

FILED JUNE 17, 1938. No. 30282.

1. **Trusts.** Endorsement of a negotiable instrument by a Massachusetts or business trust in the following form, to wit, "Conservative Inv. Co. by J. H. Lohmann, Sec.," does not impose personal liability upon the individual trustees of the trust.
2. ———. The name adopted by a Massachusetts or business trust and provision in its articles of agreement that such name shall be the collective name of the trustees and used as a convenient designation of the trustees and their successors in trust in their conservative capacity does not make such name the trade or assumed name of the trustees individually under section 62-118, Comp. St. 1929.
3. ———. Failure to stipulate against personal liability of the trustees in the above indorsement does not make the individual trustees personally liable, even though the articles of agreement required them in every written order, contract or obligation to refer to the trust agreement and to stipulate that such contract or obligation shall be subject to all the terms of the declaration of trust, where such trust agreement expressly provides that neither the trustees nor the *cestuis* shall be personally bound.
4. ———. Under sections 62-118 and 62-120, Comp. St. 1929, the trustees of a common-law trust are not personally liable upon negotiable instruments indorsed by or on behalf of the trust.
5. **Bills and Notes.** Under the provisions of the negotiable instruments act, no person is liable on a negotiable promissory note whose signature does not appear thereon.
6. ———. *Held* that this case is governed by the provisions of the negotiable instruments act, chapter 62, Comp. St. 1929, rather than by the general law with reference to Massachusetts or business trusts.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Bruckman & Dunmire, for appellant.

James D. Conway and *Stiner, Boslaugh & Stiner, contra.*

Heard before GOSS, C. J., ROSE, DAY, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

LIGHTNER, District Judge.

This is a suit by Orrin L. Plum against Louis J. Siek-

mann, Waldorf H. Brach and John H. Lohmann upon the indorsement on two promissory notes, one of $2,500 and one of $1,500. Both of these notes were made by a Mr. and Mrs. Hoff to the Conservative Investment Company and the indorsement on each was the same, to wit, "Conservative Inv. Co. by J. H. Lohmann, Sec.," and both were also indorsed by John H. Lohmann personally. Plaintiff claims that the Conservative Investment Company is a business or Massachusetts trust; that the defendants Louis J. Siekmann, Waldorf H. Brach and John H. Lohmann were the trustees thereof; that the indorsement in the name of the trust bound the trustees personally for the payment of the notes in question. The defendants Siekmann and Brach set forth in their answer the trust agreement, which they claim exempts the trustees from personal liability, and they further claim that under the negotiable instruments law they are not liable because their names do not appear upon the instrument. Mr. Lohmann made no defense and judgment was entered against him. Jury was waived and on trial to the court judgment was for defendants, and plaintiff appeals.

In addition to his claim that the above indorsement bound the defendants, plaintiff claims that Lohmann, acting for and in behalf of all of said trustees at the time of the transaction with plaintiff, represented and stated to plaintiff that all of the trustees, including the defendants above named, were personally back of the indorsement and guaranteeing the debt evidenced by the note.

We do not believe that plaintiff can base any rights on the alleged representation by Mr. Lohmann that the defendants were personally back of the indorsement and guaranteeing the debt evidenced by the note. Mr. Plum testified that Lohmann said that they, Siekmann and Brach, would stand back of everything and the security was all right, and that Lohmann satisfied him that they, the other trustees, were personally liable for the note. Mr. Lohmann denied that he had made any such representation. Unless the trust agreement gave Mr. Lohmann authority to bind

the other trustees by the representations in question, no agency or authority was shown in Mr. Lohmann to bind his cotrustees by making such representations. See on this point *Uihlein v. Budd,* 252 Ill. App. 487, wherein action was brought on a note signed "The Vincent Trust by C. R. Vincent, Pres." Plaintiff, the holder of the note, sought to hold the trustees of the common-law trust, doing business under the above name, on agency principles, and also upon the ground that the trust was controlled by the defendants. The Illinois court said:

"The facts alleged in the declaration do not justify the conclusion of law that defendant Budd is personally liable. These facts do not show that Vincent in this matter was the agent of Budd. Vincent was the president of the trust. The declaration avers that he had authority to execute notes in the name of the trust. It is not averred that he had authority to execute notes in the name of his cotrustees. * * *

"It is of course true that a trustee who enters into a contract with third persons is himself personally liable unless the agreement expressly provides that the person with whom he contracts shall look to the funds of the estate exclusively. * * * Unless such limiting language appears in the contract, the word 'trustee' is held to be only *descriptio personæ,* but there is no averment here that the defendant Budd signed any agreement."

One trustee cannot be held personally liable on an obligation incurred by a cotrustee on behalf of the trust, in the absence of anything to show that the latter was authorized to act for the former. Thus, one trustee cannot be held liable on a debt incurred in the name of the trust, by a cotrustee, merely because the latter incurred the obligation in such a way as to render him personally liable.

Furthermore, the district court's finding for the defendants in this, a jury case, where the jury were waived, has the same binding effect as a jury verdict and possibly could be interpreted as a finding that such representation was not made by Lohmann.

Appellant states his further contentions in his reply brief

as follows: "We contend that John H. Lohmann was the agent of the defendants and other trustees of the common-law trust. That he had authority to bind them on these notes. That the name Conservative Investment Company is the trade-name of the defendants and other trustees, and, consequently, in view of the fact that there was no understanding that the indorsees of said notes were to look only to the trust property for payment, these defendants are personally liable."

The trust agreement pleaded by the defendants is too long to quote in full, nor would it serve any good purpose to do so. We will, therefore, quote or refer only to the parts relied upon by plaintiff. Both in the preamble and in the body of the trust agreement there are provisions that the name "Conservative Investment Company" is the collective name of the trustees. It is said in the preamble: "The trustees in their collective capacity shall be designated as Conservative Investment Company and under that name shall so far as practicable conduct all business and execute all instruments in writing and take the legal title of all property of said trust." And again in the body of the instrument: "The title Conservative Investment Company being merely intended as a convenient designation of the trustees above named and their successors in trust in their conservative capacity." There are other similar provisions. Plaintiff especially relies upon the part of the trust agreement which provides: "In every written order, contract or obligation which the trustees by themselves or any officers or agent, shall give or enter into, it shall be the duty of the trustees to refer to this declaration of trust and to stipulate that any such contract or obligation shall be subject to all the terms of this declaration of trust."

The general rule is: "The trustees of a business trust, having substantial control of the property and business of the trust and who consequently have the status of principals, as in the case of trustees generally, are personally responsible for any obligations growing out of transactions in relation to the business of the trust, unless they have

specifically contracted in the incurring of the debt that the trust estate alone shall be held responsible therefor, and this is so, even though the trust instrument expressly declares them exempt from personal liability." 65 C. J. 1104. Many cases are cited to sustain the text, among those we have examined being *Goldwater v. Oltman,* 210 Cal. 408, 292 Pac. 624, 71 A. L. R. 871; *Linn v. Houston,* 123 Kan. 409, 255 Pac. 1105; *McClaren v. Dawes Electric Sign & Mfg. Co.,* 86 Ind. App. 196, 156 N. E. 584. See, also, cases and notes in 31 A. L. R. 856; 35 A. L. R. 504; 46 A. L. R. 158; 58 A. L. R. 518; and 71 A. L. R. 890.

The decision of this case does not rest however upon the general rule with respect to business trusts, but upon an exception to the general rule arising out of provisions of the negotiable instruments law. The exception is stated in 65 C. J. 1106, as follows: "Where the negotiable instrument law provides that one signing an instrument, who adds words indicating that he is signing in a representative capacity, is not personally liable thereon if authorized, a trustee executing a note in the name of a trust in such a way as to indicate that it is the note of the trust is not personally liable thereon." The general rule is that the trustees of a common-law trust are not personally liable upon negotiable instruments executed or indorsed by or on behalf of the trust. *Hamilton v. Young,* 116 Kan. 128, 225 Pac. 1045, 35 A. L. R. 496; *Adams v. Swig,* 234 Mass. 584, 125 N. E. 857; *Nelson Co. v. Morton,* 106 Cal. App. 144, 288 Pac. 845; *Uihlein v. Budd,* 252 Ill. App. 487; *Bowen v. Farley,* 256 Mass. 19, 152 N. E. 69; *Gutelius v. Stanbon,* 39 Fed. (2d) 621; *Tebaldi Supply Co. v. Macmillan,* 198 N. E. (Mass.) 651. Generally, no one is liable on a negotiable instrument whose signature does not appear thereon. Comp. St. 1929, sec. 62-118; *Comstock v. Reed,* 127 Neb. 752, 256 N. W. 881; *Webster v. Wray,* 19 Neb. 558, 27 N. W. 644; *Lewis v. First Nat. Bank,* 1 Neb. (Unof.) 177, 95 N. W. 355; *Reeves v. Wilcox,* 35 Neb. 779, 53 N. W. 978; *Farrell v. Reed,* 46 Neb. 258, 64 N. W. 959; *Thornton v. Farmers & Merchants Nat. Bank,* 117 Neb. 355, 220 N. W. 598.

In *Reeves v. Wilcox, supra,* land was purchased by three persons, the title taken in one who alone signed the notes. It was held that the other two who were also interested in the land were not liable since they had not signed the notes. The case of *Farrell v. Reed, supra,* was also a land transaction where the note was signed by one alone. In that case the one signing the note added the word trustee to his name, but it was held that he alone was liable and that the others interested in the land transaction were not liable. It seems, therefore, that it is not enough to show a moral responsibility or that equity and good conscience require that others in addition to the person signing the instrument should be bound. If their names do not appear upon the instrument they are not bound, and the names of Siekmann and Brach do not appear upon this instrument.

Plaintiff claims that the defendants Siekmann and Brach are liable on one of the following theories, namely: First, that John H. Lohmann was the agent of the defendants and one of the trustees of the trust and had authority to bind them on these notes; second, that the name Conservative Investment Company is the trade-name of the defendants under section 62-118, Comp. St. 1929. There is no evidence whatever to sustain appellant's first contention. The trust agreement does not give Lohmann who actually made the indorsement any such authority. The evidence does not show a course of dealing from which authority to bind the other trustees personally could arise. Such claimed authority depends entirely upon the alleged representations by Lohmann to appellant when the notes were indorsed, but the statements or declarations of Lohmann in regard to the other trustees would not bind them unless he was authorized to make them or within his apparent authority to make, neither of which appears.

Let us now examine appellant's second contention to the effect that defendants are liable under section 62-118, Comp. St. 1929, which provides: "No person is liable on the instrument whose signature does not appear thereon except as herein otherwise expressly provided, but one who signs

in a trade or assumed name will be liable to the same extent as if he had signed in his own name." Is the name of a business or Massachusetts trust the trade or assumed name of the individual trustees of the trust? We do not believe that the point has ever been decided, although the same provision is in the negotiable instruments laws of other states. A trade-name is "the name or style under which a concern or firm does business." Webster's New International Dictionary. "Trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity." *St. Louis Independent Packing Co. v. Houston,* 215 Fed. 553. See *Hartzler v. Goshen Churn & Ladder Co.,* 55 Ind. App. 455, 104 N. E. 34. "It is a matter of common observation that persons do business frequently under what is known as a 'trade-name,' adopted for the purpose of giving them an apparent standing in the business community." *Willey v. Crocker-Woolworth Nat. Bank,* 141 Cal. 508, 75 Pac. 106. "A business name, also sometimes called a trade-name or a commercial name, is that name under which a business is carried on, whatever it may be, whether a personal name, as is commonly the case, or not." *Shoemaker v. Ulmer,* 34 Pa. Co. Ct. Rep. 469.

Appellees cite on this phase of the case *General American Oil Co. v. Wagoner Oil & Gas Co.,* 118 Okla. 183, 247 Pac. 99. This was not a suit on a note, but a suit by plaintiff, a business or Massachusetts trust, on a contract, and one question was if it could maintain the action in its trust name. The court said: "The instrument creating and establishing such trust estate has generally provided a collective trade-name for the trustees in which they may make contracts and carry on the business of administration. This is a convenient expedient, which often avoids confusion and ambiguity as to the capacity in which such contracts are made, and the business in which said trustees are engaged. Such trade or firm name, when so used, may prevent misapprehension of third persons and of those dealing with the trustees by making plain that the trustees are really acting as such rather than for themselves individually."

Another case relied upon by appellees is *Hamilton v. Young,* 116 Kan. 128, 225 Pac. 1045, 35 A. L. R. 496, a suit against Charles and Young on an indorsement which read as follows: "The Victory Oil Company, By U. G. Charles, president. Attest: Fred C. Young, secretary." The Victory Oil Company was a Massachusetts trust. The Kansas court in that case held that Charles and Young were not liable personally because they signed as officers of the Victory Oil Company, basing their decision on a section of the Kansas negotiable instruments law which is identical with our own section 62-120, Comp. St. 1929, which reads as follows: "Where the instrument contains or the person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal does not exempt him from personal liability." The pertinent part of the decision is as follows: "On the face of the note, defendants are not liable. *Prima facie,* the name, 'The Victory Oil Company,' imports the name of a corporate body. * * * The signature is the signature of the corporation, affixed by its president and attested by its secretary, on its behalf. *Prima facie,* the execution was authorized. * * * Without the negotiable instruments law, nonliability of Charles and Young appeared on the face of the note, and by virtue of that law they are not liable."

See, also, *Adams v. Swig,* 234 Mass. 584, 125 N. E. 857, where the trustees of the National Realty Company, a Massachusetts trust, executed a negotiable promissory note in the following manner: "National Realty Company by Simon Swig, Edward L. McManus, Robert Luce, Louis Goldstein, trustees." The opinion of the Massachusetts court quoted the section of the negotiable instruments law above referred to and said: "In the case at bar, on its face the note purports to bear the signature of the National Realty Company by the defendants as trustees. Perforce

of the statute it follows that the defendants are not individually liable thereon if the National Realty Company existed and the defendants had authority to act for that company. * * * It follows that the note was signed in the name of a disclosed, existent principal."

The promissory note under consideration in *Nelson Co. v. Morton,* 106 Cal. App. 144, 288 Pac. 845, was signed "Trustees of Greater San Francisco Speedway Association (a trust) F. W. Pres. C. C. L. Sec." In *Bowen v. Farley,* 256 Mass. 19, 152 N. E. 69, the note was signed "Berry Real Estate Trust Trustees Owen F. Farley, Jr., for self and Co." In *Tebaldi Supply Co. v. Macmillan,* 198 N. E. (Mass.) 651, the note was signed "J. H. Realty Trust, John S. Macmillan Trustee." The note in *Gutelius v. Stanbon,* 39 Fed. (2d) 621, was signed "Harry Stanbon, William M. Nye, Walter H. Hill, Trustees of the Stanbon, Nye & Hill Realty Trust." It was held in all of the foregoing cases that there was no personal liability against the individual trustees.

The briefs of appellant indicate an exhaustive investigation of the authorities by counsel and yet they cite no case holding trustees personally liable on a negotiable instrument where the only signature was in behalf of the trust or as an officer of the trust, and we have made an independent investigation and have not found any such case. While the particular theory presented by appellant that the defendants are liable under section 62-118, Comp. St. 1929, on the ground that the trust name is the trade-name of the individual trustees has not been presented in any of such cases, this same section is, we believe, in all of the uniform negotiable instruments acts, and the reasoning of the cases above cited indicates that the name of the trust cannot be held under said acts or under said section to be the trade-name of the individual trustees.

The appellees contend that the fact that Lohmann signed the instrument personally and that some of the former notes of which the notes in suit are renewals were signed by Staley personally indicates that Siekmann and Brach

were not to be bound; that such course of dealing was the practical interpretation of the contract given to it by the parties themselves. Many cases are cited in support of the general rule which is well founded, but the only case cited involving a business trust is *Wm. Lindeke Land Co. v. Kalman*, 252 N. W. 650 (190 Minn. 601) where it was held: "Where three trustees of business trust leased property for eight-year term, signing lease 'as trustees,' and simultaneously therewith two of the trustees executed instrument, personally guaranteeing performance for first three years, whether trustee not signing guaranty was personally bound under lease *held* for jury." It seems to us also that at most this would present a jury question, but a holding on this proposition is not necessary since the authorities above cited require an affirmance of the case.

AFFIRMED.

IN RE ESTATE OF KJELD N. NIELSEN. DAGMAR EILERSEN NIELSEN, APPELLANT, V. RALPH W. NIELSEN, EXECUTOR, APPELLEE.

280 N. W. 246

FILED JUNE 17, 1938. No. 30261.

1. **Homestead.** The actual use of a dwelling as a family home is a sufficient selection under the provisions of the homestead law.
2. ———. Where the homestead is selected from the property of the wife, it must be with her consent; but such consent may, until the contrary is shown, be presumed from the use and occupancy of the property as a family home.
3. **Gifts.** "To constitute a valid gift *inter vivos*, there must be an intention to give, coupled with a completed, irrevocable gift, property delivered and title passed beyond the control and dominion of the donor." *Johnson v. Omaha Loan & Bldg. Ass'n*, 128 Neb. 37, 257 N. W. 370.
4. **Automobiles.** Title to automobile can be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St. 1929, relative to such transfer.
5. **Witnesses.** Testimony of widow with reference to conversations with the deceased in regard to an alleged gift of an automobile

is not rendered competent by the introduction by executor of the note given by deceased in payment therefor and her identification of the signature of deceased on same.

6. Costs. Taxing of costs is within the sound discretion of the trial court, and is not reviewable unless an abuse of discretion is shown.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Howard Saxton, for appellant.

John M. Berger, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

RYAN, District Judge.

This controversy arose out of the probate of the estate of Kjeld N. Nielsen, deceased. The appellant filed her petition praying for the setting aside to her of the wearing apparel, ornaments and household furniture, $200 in lieu of other personal property, $500 exemption in lieu of homestead, and she further claimed the sum of $400, being the proceeds of the sale of a Plymouth automobile which she alleged was her separate property. Upon appeal to the district court from an order allowing these claims, the district court allowed the first two items claimed, but disallowed the claim for $500 exemption in lieu of homestead, and found that the automobile was a part of the assets of the estate and disallowed her claim for the proceeds of the sale thereof, and taxed the costs of the appeal against her. From this decree she appeals to this court.

Kjeld N. Nielsen, at the time of his death and for some years prior thereto, was a resident of Omaha, Douglas county, Nebraska. He died testate on September 28, 1935. His widow, the appellant herein, Dagmar Eilersen Nielsen, renounced the will and filed her election to take under the laws of descent of the state. Appellant and her husband were living at 4255 Wirt street in the city of Omaha at the time of his death. This property was purchased under

a joint contract on October 8, 1934, and was conveyed to appellant on October 19, 1934. The purchase price was $3,200, of which amount the appellant contributed $1,500 out of her separate estate, and the balance was paid by the assumption of the unpaid amount due the Omaha Loan & Building Association on a first mortgage. The monthly payments on this loan were $32.95 and were paid by Kjeld N. Nielsen regularly until his death.

The appeal presents two principal questions: First, is a widow who held title to the family home which was the only real estate owned by either of the parties entitled to an allowance of $500 in lieu of homestead under sections 30-103 and 20-1553, Comp. St. 1929? and, secondly, does the evidence substantiate her claim of ownership of the family automobile?

For convenience in this opinion the claimant, Dagmar Eilersen Nielsen, will be designated as the plaintiff and the executor, Ralph W. Nielsen, as the defendant.

Plaintiff cites many cases, including *Meisner v. Hill*, 92 Neb. 435, 138 N. W. 583, and *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, in support of the general proposition that the courts of this state have liberally construed homestead exemptions, particularly where the rights of creditors are not affected; and there is no claim that such rights would be affected in this case as the total claims allowed against the estate were $127.17 and the estate has cash assets of $4,756.13 as shown by the inventory. The precise question presented for determination in this case, however, is whether the property at 4255 Wirt street, being lot 11, block 2, Maplewood Addition to the city of Omaha, constituted the homestead of plaintiff and her husband. If it did, then the allowance of $500 was properly denied her by the trial court. It is true that the title to that property was in the plaintiff and that she contributed the sum of $1,500 toward the purchase price out of her separate estate. It is likewise true that this court held in *Klamp v. Klamp*, 58 Neb. 748, 79 N. W. 735, that a husband could not acquire a homestead in the separate property of the wife except with

her consent. The question in that case was whether or not the husband had a right to compel the wife, from whom he had previously been divorced, to account to him for the proceeds of the homestead which was the separate property of the wife, and the court held he had not that right. In discussing that case in *Hobson v. Huxtable,* 79 Neb. 334, 112 N. W. 658, this court said: "We do not think that this case established the doctrine contended for by the appellants that the wife must declare her formal consent to the selection of a homestead from her property. We think her consent will be presumed from the actual use of the property as a homestead, which presumption can only be overcome by proof that she did not in fact consent." The first paragraph of the syllabus in that case states: "The actual use of a dwelling as a family home is a sufficient election under the provisions of the homestead law."

Plaintiff attempted to overcome this presumption by contending that Mr. Nielsen rented the home from her. After testifying to the purchase of the property, she testified as follows: "Q. Now, did you ever rent this property? A. Rented it to Mr. Nielsen. Q. And when did you begin to rent it? How soon after buying it did you begin to rent it to him? A. Well, I think he paid the first payment, the first rent on it, in November. Q. The Court: What year? The Witness: 1934. * * * Q. And what rent did he pay on this property which you bought? A. $32.95 a month. Q. And what had he been paying on the house on Ohio street? (Prior to this they had rented a house at 4136 Ohio street.) A. All the way from $32.50 to $20; he went down to $20. * * * Q. And how long did Mr. Nielsen rent that place of you? A. About eleven months. Q. That would be until the day of his death in September? A. The 28th of September. Q. 1936? A. 1935." On cross-examination she stated: "Q. And the payments to be made on the loan were, I think you stated, $32.95? A. That was including the mortgage and taxes. Q. And insurance? A. And insurance, I mean the taxes and insurance. Q. Any interest? A. No; $24.30 per month on the house and they figured in the taxes and

insurance. Q. And that made a total of— A. $32.95. Q. Now, who made those payments? A. Mr. Nielsen. Q. He had agreed with you, had he not, to make these payments at the Omaha Building and Loan Association and did make them? A. Yes, sir. Q. And he had the pass-book to go down and pay them? A. Yes, sir. * * * Q. And was there anything discussed about the way that Mr. Nielsen was to be protected for the money that he paid into the Omaha Building and Loan Association on that loan? A. Yes, sir; in case of death."

The plaintiff then identified a will which she had executed on February 12, 1935, leaving her husband a life estate in the property in the event she predeceased him, and further providing that in case the property was sold all moneys that he had paid upon the property should be repaid him, and the balance paid to her son by a former marriage. The second paragraph of the will of the decedent, Kjeld N. Nielsen, executed on September 12, 1935, and admitted to probate by the county court of Douglas county on November 2, 1935, provided:

"I give, will and bequeath to my wife, Dagmar Eilersen Nielsen, one-fourth (¼) of my estate, in addition to the interest and equity that I now have in the house that we now occupy and jointly use located at 4255 Wirt street, by virtue of having made payments and taxes and other incidentals connected therewith."

The evidence quoted considered in conjunction with the wills executed by the plaintiff and her deceased husband not only falls short of disproving the presumption that the family home at 4255 Wirt street constituted the homestead of the parties, but clearly demonstrates that Kjeld N. Nielsen during his lifetime claimed an interest in the premises.

Passing on to the claim of plaintiff that she was the owner of the family automobile, the evidence discloses that it was purchased April 30, 1934; that an old car belonging to the deceased was traded in at either $135 or $150, a cash payment of $100 was made and a note was executed by

Kjeld N. Nielsen for the balance of $481.37. This note was sold to Merchants Investment Company of Omaha, and paid by Mr. Nielsen on June 15, 1934. The automobile was registered and assessed in the name of Kjeld N. Nielsen. It was also insured against loss by fire and theft in the name of Kjeld N. Nielsen.

Plaintiff bases her claim of ownership upon the fact that, she testified, she advanced the $100 cash payment, and further that Mr. Nielsen requested her to come down to the Plymouth distributors and select the car from two shown her by the salesman, and upon certain statements testified to as having been made to third parties by Mr. Nielsen that the car belonged to the plaintiff. Three witnesses testify to such remarks. And in the direct testimony of the plaintiff she stated, "My husband always said it was my car, and I always claimed it."

This court has several times announced the rule with reference to gifts *inter vivos*. In the case of *Johnson v. Omaha Loan & Bldg. Ass'n*, 128 Neb. 37, 257 N. W. 370, it was said: "To constitute a valid gift *inter vivos*, dominion over and title to the gift must pass to the donee by the voluntary, intentional act of the donor. It must be such a delivery as will wholly pass title to the property which is the subject-matter of the gift and place it entirely beyond the control and dominion of the donor." The case of *In re Estate of Wroth*, 125 Neb. 832, 252 N. W. 322, dealt with the precise question before us in this case. In that case the plaintiff produced two witnesses who testified to statements made by the deceased which were quite similar to the statements testified to in the instant case. After reviewing the statutes governing the registration and transfer of title to motor vehicles, and the decisions of this and other jurisdictions, the court said: "Title to motor vehicles cannot be passed between living persons by mere oral declarations. In order to pass title it is necessary to comply with the provisions of sections 60-310 and 60-325, Comp. St. 1929. The statute covers the transfers of title to motor vehicles either by sale or gift *inter vivos*. It is incumbent on plaintiff, to

establish her title to the automobile in question, to produce, or account for its nonproduction, documentary evidence, showing that the statutory requirements have been complied with. This she has failed to do."

Plaintiff also assigns as error the exclusion of certain conversations alleged to have been had by her with her late husband, contending that the defendant by introducing the documents executed in connection with the purchase of the automobile, the registration and insurance of the same in evidence, after having them identified by the plaintiff, opened up the entire subject for inquiry, and that plaintiff had a right to testify in regard to conversations with her deceased husband which she claims to have had at the time she came into possession of the papers. A careful examination of the record and particularly of the cross-examination of plaintiff by counsel for the defendant discloses no foundation for this assignment of error. Counsel for defendant merely asked plaintiff to identify the signature of the deceased, her late husband, on a note, exhibit 5, and given in part payment of the automobile, and exhibit 6, which was the receipt of the Merchants Investment Company acknowledging payment of the note by Kjeld N. Nielsen. None of the testimony elicited sufficed to lift the bar of section 20-1202, Comp. St. 1929, with reference to testimony concerning transactions or conversations with deceased persons where the adverse party is the representative of such deceased person. In fact, there was positively no reference made to the time she came into possession of the documents concerning which she was interrogated. There was no error in exclusion of the testimony.

Complaint is also made by plaintiff that the trial court taxed the costs against her. Section 20-1711, Comp. St. 1929, provides: "The court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." This court has held that such action of the trial court is not reviewable unless abuse of discretion is shown. *Woodard v. Baird,* 43 Neb. 310, 61 N. W. 612; *In re*

Clapham's Estate, 73 Neb. 492, 103 N. W. 61. Most of the costs were incurred in the taking of depositions in Iowa in the attempt to prove the plaintiff's claim of ownership of the automobile, and in view of the fact that the law in that regard has been well established in this state, and the proof adduced was wholly inadequate, we are not prepared to say that the trial court abused its discretion in taxing the costs against the plaintiff.

No reversible error appearing in the record, the decree of the district court is

AFFIRMED.

FRANCES NESMITH, APPELLEE, V. ZOE MARIE CLARKE ET AL., APPELLANTS.
280 N. W. 429

FILED JUNE 24, 1938. No. 30361.

1. **Appeal.** "An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor." *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379.
2. **New Trial.** "In passing upon a motion for new trial by a *nisi prius* court, it is proper to consider conflicting and improbable evidence received upon the trial, together with all other facts, circumstances, conduct and events occurring during trial, as they appeared to the trial judge." *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379.
3. **Appeal.** "An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands." *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Loren H. Laughlin, for appellants.

G. Porter Putnam, Jr., and *Bruce Fullerton, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ.

GOSS, C. J.

Plaintiff, a girl between 12 and 13 years of age when injured by a collision with an automobile, obtained a verdict and judgment for $4,850 against Zoe Marie Clarke, the owner of the automobile, and Oscar L. Clarke, Jr., her son, who was driving the car at the time. These defendants appealed.

The accident occurred in daylight on U. S. highway No. 6, a short distance north of Milford, on October 31, 1936, as the automobile was proceeding north, and plaintiff, who had ridden a bicycle into No. 6 from Pleasantdale road, had, apparently, from the evidence, crossed the east side of the paved highway in a slightly southwesterly direction. There is evidence that defendant driver saw her when she stopped at the pavement and was several hundred feet away, and when he realized that plaintiff was in danger applied his brakes and swerved to the left but struck her near the middle of the pavement. The automobile ran across the pavement, through a ditch about eight feet deep with sloping banks, and through a fence into the field west of the highway. The automobile was going 40 to 50 miles an hour. Plaintiff was grievously injured by being thrown 60 or 70 feet north along approximately the middle of the pavement.

There had been a former trial before the same judge, resulting in a verdict and judgment for defendants. The trial court set that verdict and judgment aside and ordered the new trial on which the judgment here is predicated. The records of both trials are before us for review. It is first claimed that the trial court erred in setting aside the first verdict and judgment and in granting a new trial.

The record does not show what reasons induced the trial court to set aside the first verdict and the judgment entered thereon at the same time the verdict was received. A trial court is invested with certain power and discretion in the conduct of a case tried before him that creates a rule somewhat different from that assumed by appellants. The burden is upon appellants to show affirmatively that the

discretion has been abused by the trial court. This rule was clearly expressed in *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379, wherein this court said in the syllabus:

"An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor.

"In passing upon a motion for new trial by a *nisi prius* court, it is proper to consider conflicting and improbable evidence received upon the trial, together with all other facts, circumstances, conduct and events occurring during trial, as they appeared to the trial judge.

"An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands."

The foregoing case was used authoritatively in the more recent cases of *Clausen v. Omaha Loan & Bldg. Ass'n*, 131 Neb. 666, 269 N. W. 517; *Bonacci v. Cerra*, 134 Neb. 588, 279 N. W. 314.

Appellants having failed to show that "no tenable ground" induced the trial court to grant to plaintiff a new trial, we will not say that the trial court abused his discretion in granting a new trial.

Defendants complain and assign error in the refusal of the trial court to give their requested instruction No. 3 and particularly call attention to that phase of the instruction advising the jury that "there is no proof, to a reasonable certainty, of any permanent injury to the brain or nervous system of the plaintiff, and you shall award no damages therefor." This instruction was marked "Given as modified." By instruction No. 15 given by the court the jurors were instructed to take into consideration such injuries as were established by the evidence with reasonable certainty. It did not call particular attention to injuries to the head or brain or nervous system but left the jury to appraise damages for the injuries "established by the evidence." In view of the fact that there was evidence of a skull frac-

ture and of a nervous condition of the patient, we are of the opinion the instruction given by the court was proper and that he justly refused instruction No. 3, requested by defendants.

It is claimed by defendants that the verdict and judgment are excessive. There is ample evidence that plaintiff received a severe shock, causing unconsciousness for several days. One leg was badly fractured and had to be in a cast for weeks. It is larger than the other and causes her to "toe in" when walking. Her skull was fractured. Her injuries have made her nervous and forgetful. The natural curvature of her neck is marred. On the whole we are of the opinion the judgment is not excessive. It is

AFFIRMED.

LELAH A. SUTTON ET AL., APPELLEES, V. CHARLES L. WOOD ET AL.: FARMERS SECURITY BANK OF MAYWOOD, APPELLANT.
280 N. W. 458

FILED JUNE 24, 1938. NO. 30316.

Partition. Where a subordinate judgment lienor pleads, in a suit to partition the encumbered land, that the holders of the first judgment lien in possession are accountable to a life tenant for rents and profits under a traversed oral agreement to do so, thus reducing the amount of the first lien, the burden is on him to prove the oral agreement.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

F. J. Schroeder, for appellant.

H. A. Bryant, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a suit to partition 80 acres of land situated in Saunders county. When Mary M. Wood was owner of the

land, she died intestate October 29, 1922. It was the homestead of herself and her husband Charles L. Wood. By the statute of descent he acquired a life estate and one-third of the estate in remainder. One-third of the remainder went to the daughter Lelah A. Sutton and the other third to the son Earl Wood. The county court so decreed.

Lelah A. Sutton and Harry E. Sutton, her husband, plaintiffs, brought this suit against all other persons having interests in the land or liens thereon, including Charles L. Wood.

Plaintiffs had recovered a judgment against Charles L. Wood for $2,277.21, which was a first lien on his estates, and the Farmers Security Bank of Maywood, defendant, had recovered another judgment against him for $2,319.84, which was a second lien. These liens in the order stated were pleaded by plaintiffs and the bank. Plaintiffs were in possession and had been for several years.

Charles L. Wood, life tenant, consented to partition and prayed for the recovery of the present worth of his life estate, which was stipulated to be $1,320.

Upon a trial of the cause a sale of the property was ordered and under directions of the court a referee sold it to Harry E. Sutton for $4,800. Confirmation of the sale followed.

Before the proceeds of the sale were distributed, the bank, by separate formal pleading, though admitting plaintiffs had the first lien for $2,277.21, alleged that, prior to its date October 12, 1931, they have been in exclusive possession of the premises "Under an oral agreement for the purpose of paying or reducing the amount of their judgment against Charles L. Wood." In this connection there was a prayer by the bank for an accounting by plaintiffs for net rents and profits and for the application thereof to payment *pro tanto* on their judgment.

The making of the oral agreement pleaded by the bank was denied by plaintiffs and upon a trial of that issue the district court found there was no such agreement and ordered application of the available proceeds of the sale to

the two judgment liens as follows: To the judgment of plaintiffs, $2,277.21; to the judgment of the bank, $74.14. The bank appealed.

Upon appeal the only issue of fact presented for consideration is the making of the oral agreement pleaded. The burden of proof was on the bank. An examination of the entire record leads to the conclusion that the pleadings and evidence, both oral and documentary, are insufficient to prove that plaintiffs or either of them entered into such an agreement with Charles L. Wood, owner of the life estate and of one-third of the fee. There are many inferences to the contrary. The alleged agreement, if made, antedated plaintiffs' judgment of October 12, 1931. Fraud on the part of plaintiffs in procuring and retaining possession is not charged or proved. The life tenant himself makes no claim to rents or profits or to part payment of the judgment against him. Without explanation the plea that rents and profits should be credited on a judgment is inconsistent with a first lien for the full amount of the judgment. The benefits of credits are claimed by one not a party to the oral contract. Plaintiffs' judgment exceeded the present worth of the life estate. The life tenant claimed the present worth of his life estate, but made no claim that rents and profits due him had not been paid. The plea of the oral agreement was not made in the bank's answer to the petition, though the bank in its first answer also sought partition. On the record as it stands the findings on appeal are the same as in the district court.

Rulings on evidence are criticized as erroneous, but they afford no ground for reversal in view of the conclusion reached on the issue of the oral agreement.

AFFIRMED.

PAINE, J., dissenting.

In my opinion the evidence does not support the decision rendered herein.

C. B. MILLETT, APPELLANT, V. J. L. MILLER, APPELLEE.
280 N. W. 442

FILED JUNE 24, 1938. No. 30399.

1. **Principal and Agent:** CONTRACTS: RATIFICATION. Where a purported agent has entered into a transaction with a third person, its ratification by the purported principal has the same effect upon the liabilities of the third person to the principal as an original authorization.
2. ———: ———: ———. A principal may ratify what he could have authorized.
3. **Bills and Notes:** CHECKS: PRESENTATION. "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Comp. St. 1929, sec. 62-1603.
4. ———: ———: ———. An ordinary check is not for circulation as a medium of exchange, but must be presented for payment within such reasonable time as is consistent with the circumstances of the case and the usual method of business transaction.
5. ———: ———: ———. One retaining check for six days without presenting or returning it, although ample opportunity exists for doing either, is held to accept it as payment of the debt for which it was tendered.

APPEAL from the district court for Morrill county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

William Morrow and *F. E. Williams,* for appellant.

Neighbors & Coulter, contra.

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

DAY, J.

This is an appeal by one who brought an action to recover the amount due on a note from a judgment entered on an adverse verdict of a jury. The question presented is whether a check, given to the son of the payee, and not presented for payment within the six days between the time of its receipt and the day that the bank closed, is payment of the note.

The appellee admitted the execution of the note and asserted payment. We are, therefore, concerned entirely with the question of payment. April 4, 1928, the appellee drew his check on the Nebraska State Bank of Bridgeport in the sum of $2,013, payable to the appellant, and delivered the same to the son of the appellant. From that time until the trial of this case, the check was in the possession of the appellant or his son. The note was never in the possession of the appellee.

At the time the check was drawn on April 4 the appellee had money on deposit subject to check in excess of the amount of the check, and this condition continued until the bank closed on April 10, 1928. The appellant was a stockholder in the bank, and his son, Gregg, worked there. An exhibit in the record discloses that Miller drew some ten checks between April 2 and April 10, 1928, and that they were paid upon presentation to the bank.

The first question discussed herein is the agency of the son. The appellee, Miller, went to the bank and drew the check and gave it to the son for the exact amount due upon the note. The son took the check and called his father, C. B. Millett, the appellant in this case. The father drove over from Bayard to Bridgeport, a distance of about eighteen miles, and, in company with his son, called at the Miller home and talked with Mr. Miller that night. It is not apparent that anything was said at that time about the check or the note. The conversation is said to have been relative to the condition of the bank, but neither the appellant nor his son disclosed to the appellee, Miller, that the bank was unable to pay its checks. It was stated by them that the cash reserve must be augmented. Neither the appellant nor his son, at that time nor at any other time, tendered back the check. The check was never presented to the bank, and was outstanding in the hands of Millett, the appellant, when the bank closed on April 10, 1928. Even if the son, Gregg, was not the agent of the appellant, the evidence is that the check passed into the appellant's hands and was retained by him or by his son. But the evi-

dence establishes that the son was the agent of his father. The father came to Bridgeport and ratified the act of the son. Together they called upon Miller. Neither returned the check or made any protest concerning it. It was not even mentioned at that conversation, and the son was instructed later, according to the testimony for the appellant, to return the check. The circumstances surrounding this one transaction are sufficient to establish the agency of the son to do what he did. It is argued that he might be the agent for one purpose, but not for another. The purport of this argument is that he may have been the agent for the purpose of receiving any money on the note, but was not authorized to accept the check as full payment of the note. However, this check was turned over to the principal, the father, and he did not even protest to Mr. Miller, nor return the check to him. The rule applicable is: "Where a purported servant or other agent has entered into a transaction with a third person, its ratification by the purported master or other principal has the same effect upon the liabilities of the third person to the principal as an original authorization." Restatement, Agency, sec. 319. *Furrer v. Nebraska Bldg. & Investment Co.*, 111 Neb. 423, 196 N. W. 680; *General Credit Corporation v. Moore*, 128 Neb. 881, 260 N. W. 368; *Lincoln Joint Stock Land Bank v. Bexten*, 129 Neb. 422, 261 N. W. 845. As applied to the present case, when the father accepted and kept the check, he ratified what his agent or servant had done in accepting it. Even when, according to his testimony, he instructed his son to return it, he made the son his agent for that purpose. It is a rule in this state that a principal may ratify what he could have authorized. See *Schneider v. Modern Woodmen of America*, 96 Neb. 545, 148 N. W. 334; *Standard Bridge Co. v. Kearney County*, 95 Neb. 455, 145 N. W. 986.

Did the check constitute payment of the note? The check was drawn for the exact amount due on the note and given to the son. The son, Gregg Millett, denies that he accepted the check in payment of the note. The note was not sur-

rendered then or afterwards. It is not clear where the note was at the time. The purpose for which the check was accepted is not stated in the evidence of the appellant. It is not explained why the appellant himself retained the check. On the other hand, when the bank closed the appellee was paid a dividend on the entire deposit, including the amount of the check. The dividend paid amounted to 37 per cent., and the appellee paid the appellant more than 37 per cent. of the amount of the check. It is stated that the parties were optimistic that more would be paid, and that accounted for the overpayment. The note was payable at the bank where the son worked. The payee of a negotiable note is not bound, except by agreement, to receive anything except money in payment thereof. See *Graydon, Swanwick & Co. v. Patterson & Co.*, 13 Ia. 256, and also *Smith v. Hobleman*, 12 Neb. 502, 11 N. W. 753. Whether the check in this case was given and accepted in payment of the note was a question of fact. The jury would determine this subject to the sufficiency of the evidence. The evidence supports the finding of the jury in this case that the check amounted to payment.

The verdict of the jury may depend in part upon the third proposition to be discussed. Was the check held such an unreasonable length of time as to amount to a payment of the note? This is perhaps the main issue in the case. The check was drawn and delivered to the son on April 4, 1928. The son called his father that evening, and the father and son later called upon Miller. The bank was not closed until April 10, 1928. There is evidence that Miller had on deposit, subject to check, more than the amount of the check. The son testifies that the bank did not have sufficient cash to pay the check, although there is evidence to the contrary. Anyhow, the check was never presented, and that is really the ultimate test of a bank's ability to pay. The appellant's interest in the bank was that he was a stockholder. His son worked in the bank and gave him information, according to the evidence, not available to Miller or the public generally. The check was kept all of the time

for his own purpose and convenience. To return the check or to present it at the time might have been to question the solvency of the bank, which the appellant apparently did not wish to do at that time.

The statutes of this state provide: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Comp. St. 1929, sec. 62-1603. This is a section of the negotiable instruments act which has been adopted generally throughout the United States. It has been held, both under this statute and at common law, that a check must be presented for payment within a reasonable time after issue or the drawer will be discharged from liability on the check to the extent of the loss caused by the delay in the event the bank closes because of insolvency. This is almost a statement of the statute. This court construed the statute in *Keenan v. McClure,* 125 Neb. 753, 252 N. W. 204, and held: "Checks are not designed for circulation as a medium of exchange, and should be presented for payment with dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business." In the same case the court also said: "Holder of a check must use due diligence in obtaining money, and must present it and demand payment within a reasonable time." This opinion was later withdrawn, and the case was decided differently; but the idea therein expressed was not disproved or changed, but is in fact sustained upon this point. *Keenan v. McClure,* 127 Neb. 466, 255 N. W. 784. Many years before this present statute was adopted, the rule this court held was that an ordinary check should be presented for payment with the dispatch consistent with the circumstances of the case and the usual mode of commercial business. *First Nat. Bank v. Miller,* 37 Neb. 500, 55 N. W. 1064. The rule there announced was followed in *Western Wheeled Scraper Co. v. Sadilek,* 50 Neb. 105, 69 N. W. 765. Therefore the rule is and has long been in this state that an ordinary check is not for circulation as a

medium of exchange, but must be presented for payment within such reasonable time as is consistent with the circumstances of the case and the usual method of business transaction.

But this is not an action on a check, but upon a note which is claimed to have been paid by a check. The note was past due and there are no rights of a holder in due course intervening. The question is whether the appellee was indebted to the appellant on the note. The appellant held the check in his possession from April 4 to April 10 without presenting it for payment. This is evidence that by the retention over such a long period of time he accepted the check as payment of the note, but also that he did not present it within a reasonable time. He was near the bank on which the check was drawn, and in the ordinary course of business the check would have been presented. There is no good and sufficient reason why he should have retained the check and not presented it for payment during this time. The overwhelming weight of authority required him to do this. There is no apparent reason why this was not done. The judgment of the district court is the correct one.

AFFIRMED.

BANK OF ROCA, APPELLANT, V. E. F. MEYER, APPELLEE.
280 N. W. 449

FILED JUNE 24, 1938. No. 30353.

1. Appeal. "When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong." *Nelson v. Nelson*, 133 Neb. 458, 275 N. W. 829.
2. ———. "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." *Nelson v. Nelson*, 133 Neb. 458, 275 N. W. 829.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

G. H. Risser, for appellant.

C. A. Sorensen, contra.

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

The suit is on a promissory note executed to plaintiff bank and signed by Elmer Meyer, L. R. Meyer and E. F. Meyer. In the petition all the signers of the note are named as defendants. The action originated in the municipal court, wherein judgment went against Elmer Meyer, and in favor of E. F. Meyer. L. R. Meyer does not appear to have been summoned or appeared in the case. Appeal was taken from the judgment discharging E. F. Meyer to the district court for Lancaster county, wherein the issues tried were solely between plaintiff bank and defendant E. F. Meyer, who answered that he signed the note without consideration, at the request and for the benefit of plaintiff only, as an accommodation maker. Jury was waived and trial had in the district court without jury. The sole issue tried was whether E. F. Meyer, appellee herein, was, or was not, an accommodation maker of the note, which had been given to take the place of an earlier note of like amount signed by defendant Elmer Meyer only. The district court resolved the facts in favor of the defendant E. F. Meyer and rendered judgment discharging him.

The judgment of the district court is now here for review, and the errors assigned are that said judgment is contrary to, and not sustained by, the evidence, and that there were errors of the trial court in receiving certain testimony to which objection was made.

Entering upon consideration of the case, we meet two definite and long-established rules of this jurisdiction. They are succinctly stated, with citations of precedents, in paragraphs 1 and 2 of the syllabus in *Nelson v. Nelson*, 133 Neb. 458, 275 N. W. 829, as follows:

"In a case tried to the court, the presumption obtains

that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.

"When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong."

Examination of this record discloses ample competent evidence, if believed, to support the findings and decision of the trial court. We cannot say that they were clearly wrong.

It follows that the judgment of the district court must be, and it is,

AFFIRMED.

CHARLES LABS, APPELLANT, V. FARMERS STATE BANK OF MILLARD ET AL., APPELLEES.
280 N. W. 452

FILED JUNE 24, 1938. No. 30398.

1. **Appeal.** "The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous." Comp. St. 1929, sec. 20-1919.
2. **Trial.** The matter of appointment of an interpreter for a witness is very largely in the discretion of the trial court.
3. ———. Upon examination of the record, *held* that the trial court did not err in taking the case from the jury and giving judgment in favor of defendants.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

A. A. Rezac, for appellant.

Barton H. Kuhns and *Lawrence I. Shaw, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This is a law action originating in the district court for

Douglas county and was for the purpose of recovering damages on account of alleged misrepresentation in the sale to the plaintiff of a note and real estate mortgage in the sum of $5,000, in which it is alleged the defendants represented the same to be a first mortgage, whereas in fact it was a second mortgage, the first and prior mortgage being in the principal sum of $9,000.

At the trial, upon the conclusion of the evidence in plaintiff's behalf, a motion for a directed verdict for the defendants was sustained by the court and the action dismissed.

Upon appeal to this court the question is raised by the appellees that the appellant has not complied with the rules of the court, specifically rule 13, in the preparation of his brief and assignment of errors, in that it contains no statements of the issues actually tried in the court below, nor how they were decided, nor propositions of law particularly and separately stated, and does not contain definite or sufficient assignment of errors.

It has been frequently held by the court that compliance with such requirements is necessary. It is required both by rule of court and statute (section 20-1919, Comp. St. 1929) that "The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment." See *Federal Land Bank v. Elsemann,* 121 Neb. 397, 237 N. W. 288. What is termed "assignment of errors" in the appellant's brief herein is simply and only a copy of the provisions contained in section 20-1142, Comp. St. 1929, reciting the grounds for new trial therein numbered 1, 2, 3, 5, 6 and 8, in the language of the statute. This, while perhaps sufficient under the provisions of section 20-1144, Comp. St. 1929, in the motion for new trial, is wholly insufficient as an assignment of errors in this court.

All that remains which might be construed as a sufficient assignment of error is that the court erred in refusing to allow an interpreter for the plaintiff and his wife.

Upon this proposition we have examined the record and find that there is not in it any motion or application to the

court calling for an appointment of an interpreter or a ruling thereon. The nearest approach to it is in the direct examination of the plaintiff. After some fifty questions had been asked and answered he was asked: "Q. You know what this is? A. That is that mortgage. The Court: Let him have my glasses. Q. Can you see now? A. I cannot see that—on top I can see that. Q. And this exhibit marked '3,' did you ever see that? A. No; no. Mr. Rezac: If the court would like, we might have an interpreter. The Court: He understands you, I think. The Witness: Fine."

While it is true that the plaintiff and his wife exhibited considerable inability to understand questions put to them, yet the trial court was quite liberal in the conduct of the examinations and allowed different matters to be covered and recovered evidently to the satisfaction of the trial court that no interpreter was required and no further reference was made in the progress of the trial to the need for an interpreter. Such matters are so fully within the judgment and discretion of the trial court that we cannot find there was any error in this regard.

The foregoing might suffice for the disposition of the case, but we have read the whole record and find from it that the plaintiff purchased the mortgage in question in July, 1930, and while he claims not to have known that he obtained a second mortgage rather than a first, yet he had possession of the note and mortgage from the time of purchase, they were in his safety box at the bank, the mortgage itself specifically states that there is a first lien on the premises to Forgan Investment Company, and the note has the word "First" in large letters at the top of it ruled out in red and the word "Second" written therein above with ink.

Upon the whole facts as far as disclosed by the record, we agree with the trial court that the plaintiff did not make a case.

AFFIRMED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLANT, V. ARIE R. MULDER ET AL., APPELLEES.
280 N. W. 454

FILED JUNE 24, 1938. No. 30354.

1. **Attachment.** To sustain an attachment against the property of a debtor, at least one of the grounds for attachment set forth in the statute must exist.
2. ———. Mere insolvency of a debtor is not a ground for attachment.
3. ———. Mere proof that a farmer debtor is harvesting and marketing his crop in the usual manner is not sufficient to prove an intent to defraud his creditors.

APPEAL from the district court for Johnson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Charles A. Dafoe, Raymond B. Morrissey, Philip M. Wellman, William C. Ramsey and *Franklin L. Pierce,* for appellant.

Kenneth S. Wherry and *J. A. McGuire, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

RYAN, District Judge.

This is an appeal from an order of the district court for Johnson county dissolving an attachment. In the fall of 1934 the defendant, Arie R. Mulder, and his wife, executed their promissory note to the Land Bank commissioner in the sum of $2,400. This note was secured by a second mortgage on real estate on which the Federal Land Bank held a first mortgage. As a part of the required procedure in securing said loans, the borrower made an affidavit to the effect that the proceeds of these loans had paid his indebtedness in full. Defendant defaulted in the payments on the loan; foreclosure proceedings were instituted and decree was entered on May 19, 1936, in the sum of $3,064.75 in favor of the plaintiff as successor to the Land Bank commissioner. After the expiration of the nine months' stay the premises were sold on the 19th day of April, 1937,

to the plaintiff for the sum of $1,260, and the sale confirmed on April 29, 1937. In the fall of 1936, during the existence of the stay, the defendant sowed the premises to wheat. In the spring of 1937 and prior to the confirmation of the sale the defendant moved to Lancaster county and established his residence in that county. About the 10th of July, 1937, the wheat was ripe, and defendant returned to Johnson county, employed two combines and commenced harvesting and marketing the wheat, and collecting the proceeds as the wheat was hauled to market in Tecumseh, Nebraska.

On July 15, 1937, plaintiff commenced this action, alleging that there was due it the sum of $1,999.89 as a deficiency in the mortgage foreclosure action and praying for judgment. At the time of filing its petition plaintiff also filed an affidavit for attachment, and as grounds therefor alleged that defendant was about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that the defendant had property or rights of action which he concealed, and had assigned, removed or disposed of or was about to dispose of his property, or a part thereof, with intent to defraud his creditors. Plaintiff filed the necessary bond and an order of attachment was issued by the clerk of the district court for Johnson county. The writ was served and the return of sheriff filed showing that he had attached 658 bushels of wheat in an elevator in Tecumseh and 35 acres of wheat standing in the field.

On October 23, 1937, the defendant filed a motion to discharge the attachment. This motion was supported by the affidavits of the defendant and of Cornelius S. Mulder, to whom it appears the defendant had executed and delivered a promissory note for $1,000, and a chattel mortgage to secure the same on the wheat growing on the premises involved in the mortgage foreclosure. A supplemental affidavit was filed on December 27, 1937. On this latter date the matter came on for hearing on the defendant's motion. The evidence on the part of the plaintiff

consisted of its petition, the affidavit for attachment, defendant's affidavit made at the time of securing the loan from the plaintiff's predecessor and some oral testimony. The defendant introduced no evidence. The trial court sustained the motion and dissolved the attachment. On December 29, 1937, the plaintiff filed a motion for rehearing and new trial. This motion was overruled on January 10, 1938. Supersedeas was filed and plaintiff appeals from the order dissolving the attachment.

The sole question presented by the appeal is whether the evidence adduced by the plaintiff was sufficient to sustain the issuance of the writ of attachment.

The defendant had a right to reenter the premises and harvest the wheat he had sown in the fall at a time when he was the owner and rightfully in possession of the mortgaged premises. The modern method of harvesting wheat in that locality is by the use of combines. Since the defendant was not then living in Johnson county, it was a very natural thing to market the crop from the machine. It was what might be expected of any man in the ordinary course of affairs. There is nothing in the defendant's action in that regard that would tend to prove an intent to defraud his creditors. As was said in the early case of *Hunter v. Soward*, 15 Neb. 215, 18 N. W. 58: "The fact that a debtor designs to sell his property, or to remove it beyond the jurisdiction of a court, when not accompanied by an intent to defraud his creditors, is not ground for an attachment."

Again, in *Walker v. Hagerty*, 20 Neb. 482, 30 N. W. 556, it was said: "To authorize an attachment at least one of the causes mentioned in the statute must exist. Code, sec. 198 (Comp. St. 1929, sec. 20-1001). Mere insolvency * * * is not a ground of attachment. A man may be unable to pay his debts in full and still be doing all in his power to pay them, and so long as he furnishes no statutory cause for attachment against him, no attachment will lie against his property."

The rule in this state has always been that the intent with which an act is done is a question of fact and must be

proved. An insolvent debtor may in good faith secure one creditor to the exclusion of others. *Luikart v. Tidrick*, 126 Neb. 398, 253 N. W. 414; *Saline State Bank v. Stipek*, 131 Neb. 100, 267 N. W. 234. The evidence in this case merely shows that the plaintiff foreclosed its lien upon defendant's land; that it sold for less than enough to satisfy the amount of the decree, and that at the time of the issuance of the attachment defendant was harvesting and marketing his wheat in the usual course of his farming operations.

Plaintiff contends that the signing of the affidavit, exhibit 3, on December 27, 1934, at the time of the negotiation of the loan which was foreclosed furnished some basis to support the attachment. This affidavit was not a representation which defendant initiated, but was one of the form required by Federal Land Bank and Land Bank commissioner to be executed before the loans would be completed. It was executed more than two years before the commencement of plaintiff's action, and before the debt sued upon was incurred, and since it is not even alleged that the debt was fraudulently contracted, it clearly could not furnish a ground for attachment.

As the record discloses no sufficient ground for attachment, it follows that the judgment of the district court was right, and it is

AFFIRMED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, RELATOR, V. WALTER H. JURGENSEN, RESPONDENT.
280 N. W. 886

FILED JUNE 25, 1938. No. 30410.

1. **Officers.** Where the occupant of a public office is found guilty of a felony and sentence is pronounced upon him by a court of competent jurisdiction, he has been convicted of a felony within the meaning of that term as used in section 23, art. III of the Constitution.
2. **Criminal Law.** An error proceeding in a criminal case does not suspend the sentence within the legal meaning of that term, but does stay the execution of the sentence.

3. ———. After verdict of guilty and sentence by trial court, presumption of innocence ceases, and the law then presumes that the proceedings were regular and the conviction just.

Quo warranto by the state, on relation of the attorney general, against Walter H. Jurgensen, to determine by what right Walter H. Jurgensen assumed to act as lieutenant governor of the state of Nebraska. *Office declared vacant.*

Richard C. Hunter, Attorney General, Barlow Nye and *Francis V. Robinson,* for relator.

Richard F. Stout and *Jay O. Rodgers, contra.*

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge, with CARTER, J., participating on briefs.

KROGER, District Judge.

The state of Nebraska, on the relation of the attorney general, brings this action in *quo warranto,* as an original action in this court, to determine by what right Walter H. Jurgensen, the respondent, assumes to act as lieutenant governor of the state of Nebraska.

In his information the relator states that Walter H. Jurgensen was elected lieutenant governor of the state of Nebraska for the term commencing January 7, 1937, and qualified as such officer and entered upon the duties of such office; that on May 15, 1937, an information was filed in the district court for Lancaster county, Nebraska, charging the respondent with the commission of a felony; after arraignment and plea of not guilty, a trial was had before said court and a jury and on February 9, 1938, respondent was found guilty as charged; that on March 7, 1938, respondent's motion for a new trial was overruled and the court thereupon entered its judgment in the case and sentenced him to imprisonment in the Nebraska state penitentiary for a term of not less than two nor more than five years; that thereafter on March 9, 1938, respondent prosecuted a proceeding in error to the supreme court from such

judgment and sentence, which is now pending. Relator states that by reason of the foregoing facts the office of lieutenant governor of Nebraska became vacant on March 7, 1938, but that notwithstanding such fact the respondent has and is now assuming to act as such officer. Relator prays that the court enter its judgment that the office of lieutenant governor of Nebraska has been vacant at all times since March 7, 1938, and that respondent has forfeited all claims to said office and that he be ousted and excluded therefrom.

To this information the respondent has filed his answer in which he admits the facts set out in the information, but asserts that no final order or judgment has been entered so as to constitute a conviction within the meaning of the Constitution of the state of Nebraska, due to the fact that respondent has prosecuted proceedings in error from such judgment and sentence, and his error proceeding has not been disposed of.

Thereupon relator moved for judgment on the pleadings.

As stated by respondent in his brief filed herein, there is but one issue involved and that is: Is the verdict of the jury and the order, judgment and sentence of the district court, from which verdict, order, judgment and sentence respondent has prosecuted a proceeding in error, a "conviction of a felony" within the meaning of section 23, art. III of the Constitution of Nebraska?

The Constitution provides in section 23, art. III: "All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind."

While the question thus presented has not been passed upon by this court, it has been decided by the courts of last resort of a number of other states. *McKannay v. Horton*, 151 Cal. 711, 91 Pac. 598; *State v. Langer*, 65 N. Dak. 68, 256 N. W. 377; *Attorney General v. Montgomery*, 275 Mich. 504, 267 N. W. 550; *State v. Redman*, 183 Ind. 332, 109 N.

E. 184; *Matter of Obergfell,* 239 N. Y. 48, 145 N. E. 323; *State v. Levi,* 109 W. Va. 277, 153 S. E. 587; *State v. Chapman,* 187 Wash. 327, 60 Pac. (2d) 245, 106 A. L. R. 640; *Becker v. Green County,* 176 Wis. 120, 135, 184 N. W. 715, 186 N. W. 584; *Commonwealth v. Davis,* 299 Pa. St. 276, 149 Atl. 176; *Commonwealth v. Lockwood,* 109 Mass. 323; *State v. Alexander,* 76 N. Car. 231; *Quintard v. Knoedler,* 53 Conn. 485, 2 Atl. 752; *State v. Fousek,* 91 Mont. 448, 8 Pac. (2d) 791, 84 A. L. R. 303; *Advisory Opinion to the Governor,* 75 Fla. 674, 78 So. 673.

A comparison of constitutional or statutory provisions under consideration in those cases with section 23, art. III of the Nebraska Constitution, discloses that there is no material difference in their wording. With but one exception, the holding has been that, where a plea or verdict of guilty has been entered and the trial court has entered its judgment and sentenced the accused, there has been a conviction within the meaning of the term as used in the Constitution or statute providing that a public office shall become vacant upon conviction of a felony, and that such vacancy occurred notwithstanding the fact that a proceeding in error was taken or pending from such conviction. The basis of these decisions was succinctly stated in the case of *State v. Fousek, supra,* when the court said: "The reason for the enactment of section 511 was the underlying principle that the security of our government depends upon respect for laws and the confidence of the people in our public officers. The legislature has declared, in effect, that that confidence cannot extend to an officer convicted of a felony. *State v. Levi,* 109 W. Va. 277, 153 S. E. 587. Nor can the people generally have the proper respect for laws if their officers treat the laws with indifference." And to like effect were the remarks of the California court in the case of *McKannay v. Horton, supra,* wherein the court said: "No man has a property right in an office paramount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties, but when by

his fault or misfortune he is no longer able to render the service the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate, but he ceases to be an official; an innocent man who is unjustly convicted of a felony is doubly unfortunate, but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But if the person so convicted is the incumbent of a public office these considerations do not weigh in favor of retaining him in that position pending an appeal."

Another reason advanced by the cases cited herein is that, after plea or verdict of guilty and judgment and sentence by a court of competent jurisdiction, the presumption of innocence, which up until that time had existed in favor of the defendant, no longer prevails, but, on the contrary, the law from that time on presumes the proceedings to have been regular and the defendant to be guilty. Thus, in the case of *State v. Levi, supra,* the supreme court of appeals of West Virginia in discussing this question used the following language: "The robe of innocence with which the law invested Mr. Camp during the trial was stripped from him by the verdict of the jury. The judgment of the court has put upon him the garb of guilt. A legal as well as laical presumption has now arisen that his conviction is just. Jones, Commentaries on Evidence (1st ed.) sec. 12d; 2 Bishop, New Criminal Procedure (2d ed.) sec. 1103; Underhill, Criminal Evidence (3d ed.) sec. 42; 17 C. J. 225; *Hawkins v. State,* 142 Tenn. 238, 218 S. W. 397."

The only case we have been able to find holding to the contrary is the case of *Advisory Opinion to the Governor, supra.* The governor of Florida had suspended certain

officials under the provision of the Florida Constitution providing for suspension of an officer convicted of a felony, such suspension to continue until the next session of the legislature; and, in an advisory opinion, the supreme court of Florida informed the governor that the suspension under those circumstances did not create a vacancy in the office. No authorities are cited in the opinion and no reasons are advanced in support of the ruling.

In support of his contention that pending the determination of a proceeding in error the judgment of the district court is suspended and that until it is disposed of there is no conviction, the respondent has cited a large number of cases, among them being *People v. Schaller*, 224 App. Div. 3, 229 N. Y. Supp. 492; *People v. Fabian*, 192 N. Y. 443, 85 N. E. 672, 18 L. R. A. n. s. 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100; *Commonwealth v. Kiley*, 150 Mass. 325, 23 N. E. 55; *State v. Houston*, 103 N. Car. 383, 9 S. E. 699; *Commonwealth v. McDermott*, 224 Pa. St. 363, 73 Atl. 427, 24 L. R. A. n. s. 431; *Staniforth v. State*, 24 Ohio App. 208, 156 N. E. 924.

An examination of these cases, however, discloses that they are not in point.

In the case of *People v. Schaller, supra*, there was a plea of guilty, but the sentence was suspended by the trial court, and it was held that this did not amount to "conviction" so as to increase punishment as an habitual criminal.

In the case of *People v. Fabian, supra*, it was again held that until judgment and sentence were pronounced upon a verdict of guilty there was no conviction.

The case of *Commonwealth v. Kiley, supra*, is a case involving a liquor law violation and there was a verdict of guilty, but no judgment or sentence, and it was held that this did not amount to conviction.

To the same effect is the case of *State v. Houston, supra*.

In the case of *Commonwealth v. McDermott, supra*, defendant was found guilty of the sale of oleomargarin in violation of law, and, before sentence, was charged with a second offense, and it was held: "A defendant cannot be

sentenced for the commission of a second offense at a time prior to any former legal conviction and sentence for a first offense." (24 L. R. A. n. s. 431.)

The case of *Staniforth v. State, supra,* involved a liquor law violation, and it was held that a defendant cannot be convicted of a second offense carrying a greater penalty while his proceeding in error from conviction on the first offense is pending.

As will be seen there was, in each instance, either a suspension of sentence or no judgment or sentence had been entered, or defendant was being prosecuted for a subsequent offense carrying a greater penalty by reason of the former conviction; and the holdings of the courts were to the effect that without judgment and sentence there was no conviction, or that pending determination of a proceeding in error the accused could not be prosecuted for a second offense with increased penalty.

In the instant case there is no suspension of sentence in the legal sense of the term, but the execution of the sentence is suspended pending the determination of a proceeding in error. Comp. St. 1929, sec. 29-2301.

The disqualification for public office resulting from a conviction of a felony has repeatedly been held not to be a punishment, but is imposed in the interest of public policy for the protection of the public and sound government. It is no part of the judgment of the court, but is a consequence of the judgment. *State v. Jones,* 82 N. Car. 685.

Incidentally, section 29-2301, Comp. St. 1929, discloses the interpretation which the people of the state of Nebraska, speaking through their legislature, have placed on the term "conviction," for there we read: "When a person shall be *convicted* of an offense, and shall give notice to the court of an intention to apply for a writ of error, the court may, on application of the person so *convicted,* suspend the execution of the sentence or judgment against him." (Italics ours.)

It would create an unthinkable situation to hold that one, in law presumed to be guilty of a felony, should hold a

position of public trust and honor. There can be no doubt that this was in the minds of the people when they adopted section 23, art. III of our state Constitution. Logic and precedent impel us to the conclusion that the respondent, Walter H. Jurgensen, was convicted of a felony within the meaning of section 23, art. III of the Constitution of Nebraska, and that thereby a vacancy was created in the office of lieutenant governor.

It is, therefore, the judgment of the court that on March 7, 1938, the office of lieutenant governor of the state of Nebraska became vacant and that it has been vacant at all times since that date, and that the respondent, Walter H. Jurgensen, has forfeited all rights to said office and the emoluments thereof. Costs of this action taxed to respondent.

CHARLES WINDLE, GUARDIAN, APPELLANT, V. WILHELMINA J. KELLY ET AL., APPELLEES.
280 N. W. 445

FILED JUNE 28, 1938. NO. 30325.

1. Partition: TENANTS IN COMMON. One of several tenants in common has an absolute right to a partition of their real estate, in absence of an agreement or other impediment to the contrary.
2. ———: PARTIES. The guardian of an incompetent person who is a tenant in common with other owners of land in equal shares is a competent plaintiff to bring and maintain a partition suit in behalf of the ward.
3. ———: PLEADING. A petition by "Charles Windle, guardian of George H. Rothenburger, incompetent, plaintiff," is not demurrable for want of a competent plaintiff, where the petition itself specifically alleges that the action is brought for and in behalf of the ward.
4. ———: ———. In a suit in behalf of a ward by his guardian to partition land, where the petition states facts sufficient to constitute a cause of action showing that the equitable interests are held by a trustee under a resulting trust for the beneficiaries who, including the ward, are tenants in common, another allegation, that the duration of the trust and terms and conditions

under which the trustee held the land are to plaintiff unknown, *held* not to require nonsuit.

5. ———: TENANTS IN COMMON. Equitable owners of land in equal shares, where the beneficial interests therein are held in trust for them under a resulting trust, are tenants in common within the meaning of the law relating to partition.
6. Trusts. Conveyance of land by absolute deed to serve a specific purpose of grantors and grantee, who are owners in equal shares, creates a resulting trust, where the intention of all the parties is to retain the beneficial interests, and the purpose may be shown by parol and is not within the statute of frauds.
7. Limitation of Actions. The statute of limitations does not begin to run against an action to restore beneficial interests in land under a resulting trust until the trustee denies the interests of the beneficiaries.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed.*

J. E. Leyda and *Jean B. Cain,* for appellant.

Henry F. Schepman and *John C. Mullen, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a suit to partition 373 acres of land in Richardson county. When John B. Rothenburger was owner of the land he made a will nominating his daughter, Mary Angeline Rothenburger, executrix, and directing her to sell the land, pay his debts and his bequests and distribute the remainder of his estate equally among his two sons and three daughters: John W. Rothenburger, George H. Rothenburger, Mary Angeline Rothenburger, Wilhelmina J. Rothenburger, now Kelly, and Agnes D. Rieger. Testator died February 21, 1922, and his will was duly probated.

In consideration of "One dollar and division of property," Mary Angeline Rothenburger, executrix of testator's will, by deed dated September 4, 1923, and recorded February 6, 1924, transferred the legal title to the land to Wilhelmina J. Kelly.

In consideration of one dollar, by quitclaim deed dated

March 12, 1924, and recorded April 1, 1924, John W. Rothenburger and wife, Agnes Rieger and husband, Angeline Rothenburger, single, and George H. Rothenburger and wife, quitclaimed to Wilhelmina J. Kelly all their interests in and claims to the same land.

To secure a loan of $9,300 from the Federal Land Bank of Omaha, the grantee named in both deeds, by mortgage dated March 4, 1924, and recorded March 10, 1924, encumbered the same land for the amount of the loan.

From funds in the hands of the executrix she paid her brother John $5,000 in lieu of his interest in the land. She paid, also, the debts of testator, the expenses of administration and his bequests. In her final report as executrix she stated: "I sold the land for $33,000, which is $4,500 less than the same was appraised." The county court found there was due each of the five children of testator the sum of $6,215.53. Each receipted for that amount, but no one received any money for an interest in the land except John. The final report was approved September 7, 1923, and the executrix discharged.

In a proceeding in the nature of *de lunatico inquirendo* the son George was committed to a state hospital for the insane in 1936, and Charles Windle was appointed guardian February 3, 1936, and he was directed by the court to pay his ward's wife $15 a week for her support. The ward had incurred debts which remain unpaid.

The guardian, styling himself "Charles Windle, Guardian of George H. Rothenburger, incompetent," plaintiff, brought the action in partition, subject to the mortgage, against the other devisees under testator's will, defendants, on the theory that the grantee in both deeds acquired the legal title to and holds possession of the land under a resulting trust in which the devisees who received nothing in lieu of their claims to and their interest in the land are the beneficiaries.

The answer of defendants contains an allegation that the guardian does not have a lawful right to a partition of the land in which the ward claims an interest, a general denial

and a demurrer challenging the sufficiency of the petition to state a cause of action.

The reply to the answer is a general denial. At the close of all the evidence adduced on behalf of plaintiff, the district court entered a nonsuit. From the judgment of dismissal plaintiff appealed.

The position of defendants that the guardian had no legal right as plaintiff to bring or maintain the suit for partition is assailed on appeal as untenable. Referring to duties of a guardian the statute says: "He shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend." Comp. St. 1929, sec. 38-502. Another provision requires a guardian to manage the estate of the ward and apply the necessary income to his support and that of his family, if any, and for such support the guardian may sell the ward's real estate upon obtaining a license to do so. Comp. St. 1929, sec. 38-503. The guardian may also join in, and assent to, the partition of the ward's real estate. Comp. St. 1929, sec. 38-504. The legislature further provided that "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate," in the manner provided by other enactments. Comp. St. 1929, sec. 20-2170. One of several tenants in common has an absolute right to a partition of their real estate, in absence of an agreement to, or other impediments to, the contrary. *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369. When the statutes prescribing the duties of a guardian and granting tenants in common the right of partition are considered together, the legislative purpose to authorize a guardian to bring and maintain for the ward a suit to partition land is clearly implied. In no other way can the guardianship serve its purpose, if the ward's interest in land is necessary for his support or that of his family. It is the duty of the guardian to manage the estate of the ward, to provide support for him and his family out of his income, if sufficient, and, if insufficient, to sell his real estate to supply the means for such support.

The uncontradicted evidence proves that the income of the ward is insufficient for the payment of his debts and his wife's support. Since partition, if well founded, is an absolute right, a license to bring the suit is unnecessary. Where a guardian's suit is unnecessarily or recklessly brought, the guardian is answerable for a breach of duty. *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409. The nonsuit cannot be sustained for want of a competent plaintiff.

In justification of the dismissal it is argued by defendants that the action, even if maintainable, should have been brought in the name of the ward. Under the title of the case as it appears in the petition, it is specifically alleged that the action is brought for and in behalf of the ward. On this ground therefore the petition is not demurrable. *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409.

Defendants also insist that the suit was properly dismissed because the petition is too indefinite and uncertain for the declaring and enforcing of a resulting trust, and point out the allegation "That the duration of the trust and the terms and conditions under which the defendant, Wilhelmina J. Kelly, held said land in trust is to plaintiff unknown." The guardian was appointed many years after the trust was created. The ward was an incompetent person. All other beneficiaries of the trust were hostile to partition. In partition, "The petition must describe the property, and the several interests and estates of the several joint owners thereof, if known." Comp. St. 1929, sec. 20-2170. The petition describes the land and contains the plea that, subject to the mortgage, the legal title under the two deeds is in the grantee therein and that the beneficial interests are held by her under parol agreements to hold them in trust in equal shares for all the children of testator except his son John, who received $5,000 in lieu of his share. The petition sufficiently complies with the statute relating to partition. The allegation quoted may be regarded as surplusage or treated as an explanation why more detailed terms of the trust were not given. This allegation does not destroy the petition as a whole under the circumstances. The evidence

proves the facts essential to the establishment of the trust pleaded. Under the liberal rules of interpretation prevailing in this jurisdiction, the petition is not vulnerable to this attack.

The principal question on appeal arises on the contention of defendants that the ward is not in possession of the land and is not a "tenant in common" or a "joint tenant" for whom partition may be decreed. The statute provides: "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition." Comp. St. 1929, sec. 20-2170. "Any estate" of a joint tenant in land, therefore, is subject to partition. Does the ward have such an estate? Proper conclusions and findings on the pleadings and the evidence are as follows: The two sons and the three daughters of testator acquired this land in equal shares through the probated will of their father. For the purpose of settling the estate without delay, one of the daughters, the executrix, by oral understanding of all, in consideration of "One dollar and division of property," conveyed the legal title to another daughter. Pursuant thereto the estate was settled, but the land was never divided. The legal title which the grantee thus acquired to serve the specific purposes of all equally came from all the devisees and no one paid or received any money in the transaction. Thus far the equities in the undivided land remained as they came from testator. To enable the grantee to pay legacies, debts and the share of John without a division or actual sale of the land, the devisees, with the exception of grantee, quitclaimed in her their interests. This transaction intentionally resulted in the loan secured by the mortgage, which served the purpose stated, but no one except John received any consideration in money for the conveyance of the title.

The transactions, facts and circumstances bind grantee by a resulting trust. The pertinent rule of equity adopted here and elsewhere has been stated as follows:

"Where land has been conveyed by an absolute deed, the intention of the parties not being to confer on the grantee

the beneficial interest, but merely to facilitate the accomplishment of some specific purpose, it has been held that the purpose of the conveyance may be shown by parol, and thereby a resulting trust may be raised in favor of the grantor." 15 Am. & Eng. Encyclopedia of Law (2d ed.) 1127; *Doll v. Doll*, 96 Neb. 185, 147 N. W. 471.

Grantee contributed no more to the conveyance to her than any other beneficiary. She owned in equity only an undivided one-fourth interest in the land, the same as each of the three other beneficiaries. She held the title and beneficial interests for all subject to the mortgage. Being a trustee, her tenancy and possession were not for herself alone but, by construction of law, were for herself and the other beneficiaries of the trust on equal terms. Including the ward, all beneficiaries were tenants in common. "Any estate" of a joint tenant in land is subject to partition. Comp. St. 1929, sec. 20-2170. The suit is one in equity and the court acquired jurisdiction for all the purposes of partition with power to decree the resulting trust and determine the interest of each equitable owner of the land subject to the mortgage and to direct the division or sale thereof.

The statute of frauds and the statute of limitations are urged on appeal as defenses, though not pleaded in the answer. Neither is available as a defense. It is well-settled law that the statute of frauds does not affect a resulting trust. *Doll v. Doll*, 96 Neb. 185, 147 N. W. 471. There is nothing in the record to show the trustee, before filing her answer, denied that the ward had an "interest" in the land or gave notice to that effect. It follows that the suit is not barred by the statute of limitations.

A sufficient ground for the dismissal of the suit has not been found in the record. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

BYRD MCDONALD, APPELLEE, V. RICHARDSON COUNTY, APPELLANT.
280 N. W. 456

FILED JUNE 28, 1938. No. 30428.

1. **Workmen's Compensation.** An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law.
2. ———: COMPENSABLE INJURY. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

J. H. Falloon and *Paul P. Chaney,* for appellant.

Wiltse & Wiltse, contra.

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

DAY, J.

This is a compensation case. Richardson county appeals from an award to an injured employee. The evidence is undisputed. Byrd McDonald was employed as a clerical assistant to the county engineer at a salary of $75 a month. All of her duties were performed within the county courthouse. After finishing her work on February 20, 1937, a snowy and stormy evening, she left the courthouse to go home, intending to complete an errand of her own upon her way to her home. While walking down an automobile driveway leading from the courthouse to the street, which was the customary way for pedestrians to leave the grounds, she fell and sustained a double fracture of her left leg. She was found to be totally disabled for a period of thirteen weeks, and was unable to return to her work until May 22, 1937. She contracted medical, surgical and hospital expenses of $74.75.

The only controverted question is: Did the appellee suffer

an accident and sustain injuries arising out of her employment compensable under the workmen's compensation law? It is contended by the county that the employee had left the courthouse where the office in which she worked is located, and that the injury did not arise in the course of her employment.

It does not seem that the case of *Sentor v. City of Lincoln*, 124 Neb. 403, 246 N. W. 924, is helpful to us in the solution of the problem presented. Sentor had reported for work at a building of the city maintained by it as a headquarters of the street department for the storage of tools and equipment. He was given a shovel and sent to do a certain task of shoveling snow. Sentor's walk along the street was incidental to and a part of his work. He was injured in the course of his employment, not because he was upon the city's streets, but because he was engaged in the work of his employer.

It is of course the general rule that if an employee is injured while going to or from his work to his home (*Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N. W. 466), or is injured while absent from the employment for lunch (*De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419), or is injured while he leaves his work solely on a personal errand (*McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N. W. 517; *Bergantzel v. Union Transfer Co.*, 124 Neb. 200, 245 N. W. 593), the injury does not arise out of nor in the course of the employment.

In the instant case the employee was not engaged in the business of her employer. She was leaving the place of employment, but she was still upon the premises of the employer. She was on the courthouse grounds in the course of going home. One the way home she intended to engage in her own personal business. She did not live in the courthouse, and it was necessary for her to go home. She was leaving the premises of her employer by a route commonly used by the employees of the county. She fell and suffered an injury before she had reached the street.

In *Kasari v. Industrial Commission*, 125 Ohio St. 410,

181 N. E. 809, it was held: "Traversing the zone between the entrance of the employer's premises and the plant where an employee is employed is one of the hazards of the employment." A well-recognized annotator, in considering this case, states: "By the weight of authority injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the workmen's compensation acts, and this rule is supported by the later cases." 82 A. L. R. 1044. Cases are cited from many jurisdictions to support this statement.

In *Utah Apex Mining Co. v. Industrial Commission,* 67 Utah, 537, 248 Pac. 490, the following syllabus which is reported in 49 A. L. R. 415, substantially states the holding of the case: "An employee's death occurs in the course of his employment within the meaning of the workmen's compensation act, when it is caused by coming in contact with a cable which, without his knowledge, has accidentally become charged with electricity, although he is traveling a little-used path from his working place to the highway after quitting work for the day, the use of which by him has never been sanctioned by his employer, although others were permitted to use it, if its use by him had not been forbidden, and it was more convenient for him than the one regularly provided."

A similar case is *Matter of Lynch v. City of New York,* 242 N. Y. 115, 151 N. E. 149, where an employee in a city hospital located on an island owned by the city, after the work was finished and she was leaving to visit a sick relative, was injured by falling on a sidewalk on the premises, and the injury was held to be within the course of employment as defined in the workmen's compensation act. What was said in that case is so applicable to the instant case that it is quoted here: "Claimant came to and remained on the island solely by reason of her employment. She did not make her home there except as an employee. When she was off duty she did not at once leave the place of her employment

on her own affairs. She remained in the interest of her employer. The place was like a hospital with grounds over which the employees have to pass when their own affairs called them away. Employment did not cease when she left the hospital. It was continuous and continued while she was on the island leaving and returning thereto over the route provided by the employer for such purposes, the customary and practical way of ingress and egress. Her employment exposed her to the hazards of the way in and out. * * * Claimant when she sustained the injury was leaving the precincts of the hospital by the usual and customary way provided by her employer. * * * The city is the employer in this case. The rule here stated would be pushed to an illogical and absurd extreme if it were applied to all the sidewalks of New York over which city employees might pass on their way to and from work. But the city maintains a plant on Welfare Island and within that plant the employee is exposed to the hazards peculiar to the employment as well as the hazards of life in general. The hazards of the employment are analogous to those of an employee in a manufacturing plant or railroad shop." See 49 A. L. R. 436.

In this case Byrd McDonald was not in the courthouse for her own personal reasons. She was in the building because she was employed there. For that reason she was on the driveway on the grounds. It was necessary as a part of her employment that she come and go across the grounds after leaving the public street. To urge that she had a right to go upon the premises as a member of the public is, we think, putting too narrow a construction upon the meaning of the compensation act as to what is or is not within the course of employment. An employee is required to cross the grounds of the premises of employer. An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary inci-

dent of the employment, and an injury sustained in so doing is compensable.

The court, therefore, affirms the judgment of the trial court. That judgment is that the employee was entitled to compensation of $11.54 a week for thirteen weeks, and entitled to recover medical, surgical and hospital expenses of $74.75. The trial court awarded an attorney's fee of $40, and this court allows the fee in this court of $50.

AFFIRMED.

THOMAS WHITE V. STATE OF NEBRASKA.

280 N. W. 433

FILED JUNE 28, 1938. No. 30384.

1. **False Pretenses.** Where, in a prosecution had under section 28-1212, Comp. St. 1929, a jury found from the evidence that no arrangement for payment in the future had been made by the maker of a postdated check with the payee thereof, said check being given in payment of certain live stock purchased from the payee, and the clerks of the payee accepted said check on behalf of the payee as a demand check in payment of the live stock, without noticing the date thereof, the intent to defraud is an essential element of the offense charged in section 28-1212, Comp. St. 1929, which in part provides as follows: "Any person who, with intent to defraud, shall make or draw, or utter, or deliver, any check, draft, or order for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full upon its presentation," etc. Under the circumstances as shown by the evidence in the instant case, the postdated check is within the contemplation of said section of the statute.
2. ———. Section 28-1212, Comp. St. 1929, states a complete offense, the essential elements of such offense and the penalty for violation thereof, and section 28-1213, Comp. St. 1929, is not necessary to a prosecution under section 28-1212, said section 28-1213 covering purely matters of evidentiary character.
3. ———. Intent to defraud may be proved by the circumstances surrounding the transaction. Evidence examined in the instant

case, and found sufficient for submission of the offense as charged in section 28-1212, Comp. St. 1929, to the jury.

4. **Criminal Law**: FALSE PRETENSES: EVIDENCE OF OTHER OFFENSES. Upon trial of an offense under section 28-1212, Comp. St. 1929, evidence of other transactions, involving the giving by defendant on a preceding date of another check on the same bank to another party, is admissible for the purpose of showing his knowledge, at the time of giving the check in question, of the condition of his account in the bank, and to show guilty knowledge and intent to defraud in the making, uttering and delivering of such check.

5. **Constitutional Law**. Section 28-1212, Comp. St. 1929, is not violative of section 20, art. I of the Constitution of Nebraska, which reads: "No person shall be imprisoned for debt in any civil action or mesne or final process, unless in cases of fraud." The intent to defraud is an essential element of the offense, as contemplated by said section 28-1212.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

M. O. Bates, for plaintiff in error.

Richard C. Hunter, Attorney General, Harry S. Grimminger, John G. Tomek, Elbert H. Smith and *S. S. Diedrichs, contra.*

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

MESSMORE, J.

Plaintiff in error (hereinafter called defendant) was convicted of the offense of issuing a no-fund or insufficient-funds check to the Stickelman Auction Sales Company of Gothenburg, Nebraska, on June 12, 1937, in the amount of $2,466.76. Motion for a new trial was overruled, and the court imposed sentence. The defendant was tried on one count which was proper in substance and form to bring the case to this court for review upon the alleged errors made by the trial court and the sufficiency of the evidence, as contended by defendant.

Defendant was engaged in dealing in live stock in various towns in Nebraska. In the latter part of October or the fore part of November, 1936, he contacted Ernest C. Stickel-

man, who was, and had been for the past 34 years, engaged in the live stock and commission business, and for the past six years in Gothenburg under the name of "Stickelman Live Stock Auction Sales Commission Company," as sole owner. The defendant testified that he told Mr. Stickelman that he desired to buy live stock at his sales barn and gave certain references, First National Bank of Boulder, Colorado, where he lived; that on numerous occasions subsequent to that date he purchased live stock ranging in amount from $300 to $800, at different sales. On the day in question, June 12, 1937, he purchased some 81 head of hogs and eight head of cattle, giving in payment therefor a check in the sum of $2,466.76. This check was dated "7/12 1937;" in other words, it was postdated. On the evening of June 12, 1937, defendant loaded the stock which he had purchased; it was shipped to Denver, Colorado, and disposed of early in the following week. The check in question was deposited for payment and returned for the reason that it was not yet due; that it would be due July 12, 1937. At the time the check was presented to the clerks at the sales barn, no statement was made by the defendant as to the check; it was received by a young lady, handed by her to another clerk, and subsequently to a third clerk, who placed it in a drawer, none of the clerks noticing the date of the check. Mr. Stickelman did not see the check at the time. Later, he and one Burke, who had had a similar experience just previously, journeyed to Boulder, Colorado, in search of the defendant, but were unable to locate him either in Boulder or in Denver, and, in fact, he was not located until arrested in Minneapolis, Minnesota, in September. On July 12, 1937, there were insufficient funds in the bank at Boulder to pay the check; the check was protested, and the check and protest thereof were turned over to the county attorney.

The defendant contends that the verdict of the jury is not sustained by sufficient evidence and is contrary thereto.

This prosecution was brought under section 28-1212, Comp. St. 1929, which reads in part as follows: "Any per-

son who, with intent to defraud, shall make or draw, or utter, or deliver, any check, draft, or order for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full upon its presentation, shall upon conviction, be punished," etc.

The defendant contends that the check in question is a postdated check and not within the contemplation of the above statute; that the statute contemplates a demand check, and that, at most, the check in the instant case is a promise to pay in the future and is analogous to a promissory note; that the record discloses no evidence that at the time of the issuance of the check the defendant had insufficient credit with or funds in the bank upon its presentation for payment, and that Stickelman, by not protesting the check until 30 days thereafter, July 13, acquiesced in extending credit to the defendant. Defendant contends that the gist of the offense is a failure to have sufficient funds or credit in the bank at the time of presentation, and that this check was returned by the bank because it was a postdated check.

Defendant cites cases holding to the effect that a postdated check is not within the purview of the statute making it an offense to draw a check without having sufficient funds with which to meet it. An analysis of most of the cases cited clearly indicates that the payee therein had an agreement with the maker to hold the check, thus creating a contractual relation to permit the maker to pay in the future, or the transaction was such that the holding of the check was a necessary incident by agreement of the parties. The payee having acquiesced in or agreed, there could be no intention to defraud. There are some cases cited which hold that a postdated check is not within the purview of the statute. We believe that this is not conducive to a logical conception, in view of the provisions of our statute and the circumstances of the instant case.

An examination of section 28-1212, Comp. St. 1929, indi-

cates that it does not state "postdated check;" neither is the date of any instrument, as contained in the statute, given or required to be given. The principal ingredient of the offense is the intent to defraud.

The well-considered case of *People v. Bercovitz*, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. n. s. 667, held that a postdated check was within the contemplation of the California statute which, in some particulars, is like the statute in Nebraska. In commenting on this point the court said in the body of the opinion (p. 638): "There is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the 'check or draft' is postdated. It is essential, of course, that there should be on the part of one giving the check or draft both present knowledge of the insufficiency of funds and absence of credit with such bank, etc., to meet the check or draft in full upon its presentation, and an intent to defraud, but no reason is apparent why both of these elements may not exist as well in the case of a postdated check or draft as in the case of one bearing the date of its delivery." And, in considering the word "credit," which appears in the California and in the Nebraska statute, the opinion quotes that part of the statute as follows: "The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depository for the payment of such check or draft." The Nebraska statute (Comp. St. 1929, sec. 28-1212) refers to "check, draft, or order for the payment of money," and is an independent act, founded upon the intent to defraud by the issuance of a check, draft, or order for the payment of money. The guilt of the defendant would be necessarily determined by his intention to defraud, whether the check is payable on demand or postdated. The case of *People v. Bercovitz, supra,* meets the situation as contended for by the state in the instant case.

The defendant further contends that the check in question, being a postdated check, payable in the future, constitutes one due and payable at a future time, and that the

statute, construed to provide criminal punishment for its nonpayment, is contrary to section 20, art. I of the Constitution of Nebraska, which provides: "No person shall be imprisoned for debt in any civil action or mesne or final process, unless in cases of fraud." Inasmuch as an intent to defraud must be shown in this action if the defendant is to be found guilty, the provision of the above act we believe is sufficient to preclude the contention that the provision of the Constitution, above quoted, has been violated.

Defendant cites, in support of his contention on this proposition, *Burnam v. Commonwealth,* 228 Ky. 410, 15 S. W. (2d) 256, and *State v. Nelson,* 58 S. Dak. 562, 237 N. W. 766. In the former case, a Kentucky law, providing punishment for the offense of making, uttering and delivering a check, draft or order, for payment on presentation, without regard to an attempt to defraud, was held violative of the Constitution. In the opinion we find this language (p. 411): "The essential and controlling difference between the act (the Kentucky act) and other statutes of this kind, including those of our own state (Kentucky) enacted and repealed from time to time, is that the element of fraud or other criminal purpose is not an ingredient." This is not true of the Nebraska statute because intent to defraud is one of the very essential elements of the offense.

In the case of *State v. Nelson, supra,* the supreme court of South Dakota held that a postdated check is only a representation of the drawer that he expects to have funds in the bank with which to pay the check on the date named therein; that in this respect there is no essential difference between a postdated check and a promissory note, and no difference in principle between prescribing sentence for failure to pay a promissory note and for failure to pay a postdated check; holding the law to be unconstitutional as effective against a postdated check as imprisonment for debt. An examination of the above case indicates that the check was delivered to payee on October 22 and was dated November 22. Several provisions of the statute were cited,

the court saying (p. 565): "It is not until the check has been presented at the bank or after maturity and payment refused for lack of funds that the crime was complete; therefore the penalty fixed by the law is for failure to pay the check rather than for issuing the check." The opinion quotes section 3 of the act as follows: "Where a prosecution is begun under this act, the defendant shall have a right, upon application made for that purpose before trial, to have said action abated by showing to the court or the judge that he has had an account in said bank upon which said check, draft or order was drawn, thirty days next prior to the time said check, draft or order was delivered, and that said check, draft or order was drawn upon said bank or depository without intent to defraud the party receiving the same;" and the opinion adds: "The question then becomes, is the penalty provided by section 2 inflicted for issuing the bad check or for failure to make satisfaction as provided under section 3?"

The above case is not analogous to the situation in the case at bar, wherein the defendant contends that section 28-1213, Comp. St. 1929, must be read in connection with the preceding section 28-1212, and that the two sections constitute the complete no-fund check act; that the penalty is inflicted for failure to make satisfaction, in view of said section 28-1213; that the execution and delivery of the check by defendant, as set out in said section 28-1212, does not constitute a complete offense; that it is not until the check has been presented at or after maturity and payment is refused for lack of funds that the offense is complete; that the penalty fixed by the law is for failure to pay the check, rather than for issuing the check, and that, therefore, the statute violates the provisions of the Constitution, hereinbefore cited.

Section 28-1213, Comp. St. 1929, reads: "In any prosecution under this act as against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee because of lack of funds or credit, shall be presumptive

evidence of intent to defraud and of knowledge of insufficient funds in, or credit with such bank or other depository, provided such maker or drawer shall not have paid the payee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order shall have been protested, the notice of protest thereof shall be admissible as proof of such presentation for payment, nonpayment and protest; and if such notice of protest or the drawee's notice of dishonor thereof, shall state that payment of such check, draft or order was refused because of lack of funds or credit of the maker or drawer, then such notice of protest or notice of dishonor shall be presumptive evidence that there was a lack of funds in, or credit with, such bank or other depository, for the payment of such check, draft or order."

Suffice it to say that section 28-1212, Comp. St. 1929, states the offense and punishment therefor; and that section 28-1213, Comp. St. 1929, is purely a section relating to evidence that may be introduced and is not essential to the proof, as required in section 28-1212, to complete the offense; nor does it contain any of the essential ingredients of the offense, but it is purely of an evidentiary character, which clearly distinguishes it from the South Dakota case cited by defendant.

In this connection, *State v. Taylor,* 335 Mo. 460, 73 S. W. (2d) 378, 95 A. L. R. 476, held an act to be constitutional where a postdated check was given, and not violative of the provision of the Constitution of Missouri that imprisonment for debt will not be allowed, and the opinion cited in support thereof the California case of *People v. Bercovitz, supra,* adopting for the purposes of its opinion the propositions of law as set forth in the California case, relating to a postdated check as within the contemplation of no-fund check statutes. We deem further analysis on this proposition unnecessary, in view of our interpretation of the Nebraska act, as hereinbefore set out.

The defendant contends that the evidence is insufficient

to constitute the offense. Without repeating the evidence, it will be noted that the defense offered was a conversation had between the defendant and Stickelman that defendant would be unable to pay for the live stock which he would purchase on that date, and that he would give a postdated check, which was acceptable to Stickelman. This conversation was denied by Stickelman, and the jury believed his evidence. The evidence further discloses that immediately after receiving the live stock and selling it, this defendant went to many states, until he was finally apprehended in Minneapolis, Minnesota. It will be noted that on June 12 the defendant purchased from Stickelman from three to eight times as much live stock as he had purchased on previous occasions. His conduct would indicate that it led the clerks of Stickelman to believe that the check was payable on the date on which he gave it. On the trips made by Stickelman and Burke to Boulder and Denver, they were unable to locate the defendant. He had moved out, bag and baggage. When he was finally apprehended and confronted by Burke and Stickelman, he said that he moved because he was "on the spot" and was "in a jam." On the previous day, June 11, 1937, he had made a similar purchase and had given a similar postdated check to Mr. Burke at North Platte, Nebraska, for 800 and some odd dollars. This evidence was admitted solely for the purpose of showing fraudulent intent on the part of the defendant. We believe that the evidence was sufficient to submit to the jury the question of defendant's intent to defraud Mr. Stickelman. Many authorities are cited to the effect that this is an essential ingredient of the offense under statutes of this character. Without citing the authorities, we conclude that section 28-1212, Comp. St. 1929, specifically makes the intent to defraud an essential element of the offense.

Exceptions are taken to instructions given by the trial court in that the value of the property lost by Stickelman was fixed by the jury. While this is an unnecessary proposition to have submitted to the jury, we find no prejudicial error in such submission.

Exception is also taken to the admission of the evidence of Mr. Burke, who on the day previously had had a similar transaction with defendant. In this connection, in *State v. Sparks*, 79 Neb. 504, 113 N. W. 154, it was held: "When, however, the transaction on which the prosecution is based is of such a character as to require other or further proof, on the part of the prosecution, of the defendant's guilty knowledge and intent, evidence that he has committed like crimes in a similar manner, at or about the same time, or as a part of the same general scheme to defraud, may be received for that purpose." This was also held in *People v. Bercovitz, supra.*

Exception is taken to an instruction on the foregoing proposition given by the trial court. The record discloses that the court stated that the evidence was admitted simply for the purpose of showing fraudulent intent and it so instructed. While the instruction lacked some degree of refinement, it was sufficiently explicit.

Defendant complains that the court did not instruct on section 28-1213, Comp. St. 1929. In view of our statement relating to such section of the statute, we see no reason why the court should have so instructed.

AFFIRMED.

IN RE GUARDIANSHIP OF ROSALIA BLOCHOWITZ. ANNA GEISTLINGER, APPELLEE, V. ROSALIA BLOCHOWITZ, APPELLANT.

280 N. W. 438

FILED JUNE 28, 1938. No. 30387.

1. **Insane Persons.** The incapacity of an individual, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case, and when such question is properly submitted to a jury, the jury's findings therein will not, ordinarily, be disturbed. *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394.
2. ———. "The descriptive words, 'mentally incompetent,' 'incompetent,' and 'incapable,' as used (in the statute) mean any

one who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause or causes, unable or incapable, unassisted, of properly taking care of himself or managing his property, and by reason thereof would be liable to be deceived or imposed upon by artful or designing persons." *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394.

3. ———. "Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life." *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Clark Jeary, Michael T. McLaughlin and *Mockett & Finkelstein*, for appellant.

Ledwith & Ledwith and *S. M. Kier, contra.*

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

MESSMORE, J.

This is an appeal from the verdict of a jury and judgment of the district court for Lancaster county, wherein the jury found that a guardian should be appointed to care for the property of Rosalia Blochowitz, an alleged incompetent.

This action was brought by Anna Geistlinger, a daughter of Rosalia Blochowitz, the petition alleging that Rosalia Blochowitz was possessed of certain property, the exact nature and existing condition and value thereof not definitely known; that she is 85 years of age and is in enfeebled health, and that, by reason of her mental and physical condition, is incompetent and unable to properly care for and manage her property. The petition prays for appointment of a guardian. Frank J. Blochowitz, one of the sons, filed an answer, which is a general denial. Likewise, an answer in the form of a general denial was filed on behalf of Rosalia Blochowitz. Frank J. Blochowitz is designated herein as an intervener resisting the guardianship.

The evidence discloses the following: In 1880 Rosalia

Blochowitz and her husband, Joseph Blochowitz, natives of Poland but of German stock, migrated to the United States, locating near Martel, Nebraska. Through extreme frugality and incessant hard work by themselves and the members of their family, who numbered seven children, one having died in infancy, a great amount of land and personal property was accumulated. On February 20, 1930, Joseph Blochowitz died. On April 4, 1929, prior to his death, Joseph Blochowitz and his wife Rosalia executed four warranty deeds, each in due form, which purported to convey to the four sons certain parcels of land located in Lancaster county, as follows: To Frank J. Blochowitz the southeast quarter of section 14, reserving the payment of $600 to be made annually by the grantee to grantors during their lifetime; to John Blochowitz the northeast quarter of section 14, reserving annual payment of $400 to be made by the grantee to the grantors during their lifetime; to Albert Blochowitz the north half of the northeast quarter of section 11, reserving the payment of $400 annually by the grantee to the grantors during their lifetime; to George Blochowitz the east half of the southwest quarter and the south half of the southeast quarter of section 11, also the east half of the northwest quarter of section 14, reserving annual payment of $800 to be made by the grantee to the grantors during their lifetime, and also reserving two rooms in the premises for the grantors during their lifetime.

The history of the children living follows: Frank J. Blochowitz, the eldest child, is unmarried; Lena Yankton married at the age of 18 years and left the family home; she is now 52 or 53 years old; Anna Geistlinger, a few years younger than Lena, married at the age of 16 years and left the home. The other children are John, who is at home, Albert, who married in 1923 and lives near Raymond, Nebraska, and George, who is at home. Rosalia Blochowitz lives with George and John on what is known as the home place. She does the housework, cooking, takes care of the chickens and works generally as she had been accustomed to work in previous years.

The principal contention is relative to the annuities, as fixed by the deeds and the payments to be made to Rosalia Blochowitz by her sons. The evidence in this respect shows that she generally receipts for the payments to be made by Frank and George, and does not actually take the money, but explains that the boys need it for machinery and horses. Litigation deprived John of his land, which was subsequently sold by the Martel State Bank to Frank, who, in turn, sent a deputy sheriff to the home of his mother with $400, evidencing a year's rent under the deed, which was refused by the mother, perhaps at the suggestions of George, who was present at the time the amount was tendered. This money was brought back and placed in a Lincoln bank by Frank in his mother's name. Albert had previously lost his land, and payments are made to the mother by persons who succeeded to the rights of Albert. The record discloses that John received from his mother some moneys and intermingled such money with his own in the purchase of certain securities in his name. The mother relies implicitly on the boys and believes that she may have the rent payments whenever she desires to have such payments made, even though she has given receipts therefor to the sons, and that if she wants any money the boys will see that she has some, and there is evidence that shortly before this trial she did receive $50, which she placed in a bank at Crete. The evidence also shows that she has a bond, not identified as to kind, in the amount of $1,000. She apparently is unaware of the fact that John and Albert have lost their respective farms and unaware that a lawsuit was instituted against Albert for delinquent payments of rent, as provided for in the deed to him, and that collection was enforced thereon in an amount of over $600. The amounts owing by the sons, to be paid as shown by the deeds, date from 1931, and had such sums been paid as provided for in such deeds, and credited to the account of Rosalia Blochowitz, and had she been mentally competent to manage her business affairs in the usual manner, she would have a sufficient amount of money to give her a

degree of independence, which she does not now possess.

The testimony of Rosalia Blochowitz discloses that she does not know the amounts receivable; nor is she able to distinguish such amounts as may be owing her by her sons. She receipted for the amounts by placing an "X" on the receipts and refused to accept the money. She had not seen her two daughters for some period of time; did not know the number of children in her daughters' families, and when her daughters came to visit her just before the trial of this action, they were told by John that their mother did not want to see them; and, in fact, she remained indoors and did not see them. Likewise, a grandson on several occasions attempted to see his grandmother and was told by George that she was not well or able to be seen. George and John apparently were present in most instances when other members of the family would call on the mother. There is evidence of strained relations existing in the family by virtue of previous litigation, when Anna, her sister and Albert sought to set aside the deeds mentioned. However, the mother had no part in such litigation.

Rosalia Blochowitz's testimony contains many inconsistencies and discrepancies as to age, time, the death of her husband, amounts owing to her by her sons by virtue of the deeds; when the amounts are owing, the exact sums, by whom owing, and the amount of land which the boys have, and the owners of the land from which she received some of the benefits, where such land had been taken over by those outside of the family. All of such facts are indicative of mental incompetency, and that she was unable to comprehend some of the most common things within the knowledge of individuals in similar and like circumstances. This may be attributed in some measure to her inability to properly understand and express herself in the English language. She speaks German and some broken English. All of such facts, however, relate to her mental competency, and, together with all of the other circumstances and testimony in the case, are for the jury, to determine her ability to carry on the ordinary business pursuits of life; that is, to man-

age her business, know the amounts of and understand what money is owing her, and other items in the transaction of business, and were obviously considered by the jury.

The testimony of the witnesses for the intervener and for the alleged incompetent discloses that two of the witnesses for intervener had conversed with Rosalia Blochowitz on the Friday preceding this trial, and had noticed no difference in her conversation than at other times previously when they had conversed with her. However, such witnesses had had no direct business dealings or business relations with her of any kind or nature. One witness for the intervener testified that since 1930 he had seen Mrs. Blochowitz but once. This testimony does not contain one instance which bears upon the mental capacity of Rosalia Blochowitz to manage or control her property or her understanding with reference to her business affairs. Another witness relates a conversation with reference to the time she was "culling chickens;" when Rosalia Blochowitz stated, in substance: "That is nice you are interested in it." Other evidence of the several witnesses, six in number, for the alleged incompetent details primarily the mental condition of Rosalia Blochowitz years previously, and does not specifically or in any manner relate to direct business transactions had with her during recent years. The jury had the benefit of this evidence.

The appellant challenges the sufficiency of the evidence to show by a preponderance thereof that a guardian should be appointed over the property of this alleged incompetent. No exceptions were taken to the instructions given by the trial court, and a careful reading of the same convinces us that the matter was properly submitted to the jury. The jury had the opportunity of considering and weighing this evidence, of observing the general conduct and demeanor of the witnesses while testifying, and especially of the alleged incompetent, Rosalia Blochowitz, and after an analysis of the facts, being the constitutional triers thereof, they concluded that a guardian should be appointed, and so ren-

dered their verdict. Each case involving the guardianship of an incompetent person must, of necessity, stand or fall upon the circumstances and evidence shown and the conditions surrounding the transaction. In almost every instance in cases involving guardianship, the courts have so held.

In this state, section 38-201, Comp. St. 1929, provides: "When the relatives or friends of any insane person, or of any person who, by reason of extreme old age, or other cause, is mentally incompetent to have the charge and management of his property, shall apply to the county court to have a guardian appointed for him," etc.

In the case of *Keiser v. Keiser*, 113 Neb. 645, 204 N. W. 394, this court has pronounced the following law:

"The incapacity of an individual, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case for the trial court, whose finding thereon will not ordinarily be disturbed. * * *

"The descriptive words, 'mentally incompetent,' 'incompetent,' and 'incapable,' as used (in the statute) mean any one who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause or causes, unable or incapable, unassisted, of properly taking care of himself or managing his property, and by reason thereof would be liable to be deceived or imposed upon by artful or designing persons.

"Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life.

"Where a person has insufficient mental capacity for the just protection of his property and his mental condition is such that he is guided by the will of others instead of his own in its disposition, a guardian should be appointed."

Where one is, by reason of old age, disease, weakness of mind, or from any cause, unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed. *Guardianship of Farr*, 169

Wis. 451, 171 N. W. 951; *Burke v. McClure*, 211 Mo. App. 446, 245 S. W. 62.

In the instant case, there is no suggestion that a guardian should be appointed over the person of Rosalia Blochowitz, but solely over her property, and the appointment of a guardian does not deprive her of the ownership or use of her property, or of the benefits that may be derived therefrom, and can have no adverse effect upon her personal comfort. From the evidence it is apparent, as a matter of fact, that Rosalia Blochowitz never had, in fact, transacted her business, and apparently she is hopelessly unable to do so.

It is argued that Rosalia Blochowitz may never become a public charge; that she is living with her sons who are able to provide for her and who are good to her. However, we believe the real test has been stated in the cases cited in this opinion, and that she is entitled to enhance or enlarge upon her estate by receiving that which is justly due her, as set forth in the deeds of conveyance, and to be paid to her by her sons. This constitutes her estate, and it is not so much a question of her becoming a public charge as it is to conserve the estate, to avoid all probability of such a situation arising. To that end, a guardian would be able to properly preserve her estate. In her present situation she is a dependent, while if her estate were managed in the ordinary manner relating to business, she would be independent.

We believe that we have quoted sufficient evidence from the record and set out sufficient authority to justify the verdict of the jury and the judgment of the district court.

AFFIRMED.

INDEPENDENT LUBRICATING COMPANY, APPELLEE, V. WILLIAM T. GOOD, APPELLANT.

280 N. W. 460

FILED JUNE 28, 1938. No. 30396.

1. Appeal. Statutes limiting time of appeal are jurisdictional and mandatory, and the trial court has no power to, directly or indirectly, extend the time so limited.
2. ———. The statute regulating the revival of actions and providing a period of one year in which revival may be had is permissive in its quality and does not operate to modify the appeal statute, once the latter has commenced to run, but must be subordinated thereto.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Loren H. Laughlin, Alva Gaylord and *Clark Jeary,* for appellant.

G. Porter Putnam, Jr., and *Bruce Fullerton, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This case was before the court on a former occasion and is reported in 133 Neb. 431.

The original judgment which is involved in both appearances of the case in this court was rendered in favor of the plaintiff March 11, 1937. Bond and notice of appeal therein were given by the defendant April 17 and defendant died May 8. Transcript for the purpose of appeal was filed in this court June 24, 1937. This was followed by a suggestion by the plaintiff of want of jurisdiction in this court by reason of the death of the sole defendant prior to the filing of the transcript, and want of a representative in the proceedings, which was opposed by the special administrator, who, in the meantime, July 23, was appointed and applied for an order of revivor in his behalf in this court. Therein this court held that the appeal prosecuted in the name of a sole defendant who died before the tran-

script was filed in this court must be dismissed because of no jurisdiction; that it was necessary for the representative of the deceased to get an order of revivor of the action in the district court; that the supreme court did not have jurisdiction until the transcript was filed in this court, and when it was filed the defendant was dead; and that in such case the supreme court could not substitute the representative as defendant, but the substitution must be had in the court having jurisdiction.

After the issuance of mandate from this court December 9, 1937, the administrator representing the defendant presented an application in the district court for revivor therein, which was denied in that court, and from such order of denial this present appeal is prosecuted. It should be borne in mind that the proceeding here presented for review is not for revivor of the judgment of March 11, 1937, as such, but for revivor and continuance of the action for the purpose of prosecuting an appeal from that judgment.

The application was met by objection that the three months' limitation provided for by statute, section 20-1912, Comp. St. 1929, after the rendition and entry of the judgment from which appeal was sought had expired; that the judgment had become final and no appeal could be had therefrom. To this appellant answers that the limitation prescribed by said statute is not conclusive for that the statutes pertaining to revivors, sections 20-1413, 20-1414, Comp. St. 1929, provide the same may be had within the period of one year; that such provisions take precedence and suspend the running of the time for appeal until a representative is appointed and revivor had.

The ultimate issue before us, then, is whether in case of the death of a sole defendant the statute relating to revival suspends the running of the statute relative to appeals after the latter has commenced to run.

Considering this question, it is advisable to look at the status of the statute relating to appeals to this court (section 20-1912) which provides that the procedure shall be by filing in the supreme court a transcript within three

months from the rendition of such judgment and that the filing of such transcript shall confer jurisdiction in such causes upon this court. The statute makes no exception and indicates no ground upon which exception might be made. It has many times received the consideration of this court and, in reference to it, this court has in substance said that, in order to vest the supreme court with jurisdiction to review a judgment, decree or final order made by the district court in civil cases, a certified transcript containing the judgment, decree or final order must be filed in the supreme court within three months from the rendition of the judgment, decree or final order, or within three months from the overruling of the motion for new trial in the cause; also, that the statutes prescribe a time within which an appeal may be taken to this court and it is essential to the jurisdiction that the appeal be prosecuted within the time limit by filing a transcript within three months; and that the trial court has no power to extend the time either directly or indirectly as by vacating a judgment and re-entering it as of a more recent date; that the legislature having power to limit the time within which an appeal must be taken, it is essential to the jurisdiction of this court that it be taken within the time limit prescribed, and the trial court has no inherent power directly or indirectly to extend the time for taking an appeal; and it appearing that an order was entered for that purpose it is ineffective; that the rule is that, no transcript of the proceedings in the district court having been filed in this court within three months from the rendition of the final order, this court acquires no jurisdiction. This view was early adopted by this court. *Verges v. Roush,* 1 Neb. 113. It has been maintained through all the years in an unbroken line of decisions down to *State v. Amsberry,* 104 Neb. 273, 177 N. W. 179, and *Frazier v. Alexander,* 111 Neb. 294, 196 N. W. 322. The great weight of authority in the United States is in accord with this rule where similar statutes and constitutional provisions are in force. *Larson v. Wegner,* 120 Neb. 449, 233 N. W. 253; *Morrill County v. Bliss,*

125 Neb. 97, 249 N. W. 98; *Bradley v. Kalin*, 125 Neb. 363, 250 N. W. 257; *Independent Lubricating Co. v. Good*, 133 Neb. 431, 275 N. W. 668.

Of the many instances where, in the courts of other jurisdictions, this rule has been followed there is found in *Williams v. Long*, 130 Cal. 58, 62 Pac. 264, 80 Am. St. Rep. 68, a very terse and clear statement of the doctrine as follows:

"In the absence of an express authorization in the statute itself a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. No such authorization is found in the statutes of this state. In this case the statute had begun to run, and had been running against this appellant for more than five months before the death of the plaintiff. It is a well-settled rule and principle of law, except as modified by positive enactment, that when the statute of limitations has begun to run no subsequent disability will suspend its operation. In *Pace v. Ficklin*, 76 Va. 292, the time in which an appeal should have been taken was limited to two years. Judgment was rendered against an assignee in bankruptcy, and during the two years the assignee died and a successor was appointed. In support of the appeal it was urged that the period between the death of the first assignee and the appointment of his successor should be deducted from the statutory time. But the court said: 'In answer to this it is sufficient to say that the statutes defining and limiting the right of appeal make no such exception or restriction, and there is no rule or principle in law which authorizes the courts to do so. * * * In this case Pace was alive at the date of the decree. The limitation then commenced to run, and so continued, notwithstanding his death at a subsequent period.'"

In 3 Am. Jur. sec. 424, it is stated:

"The general rule that no disability will postpone the operation of the statute of limitations unless it exists when the cause of action accrues, and that when the statute be-

gins to run, no subsequent disability will interrupt it, applies to a statute prescribing the time within which an appeal or error proceeding may be taken."

In the former opinion in this case (133 Neb. 431) there is cited and relied upon the case of *Powers v. Standard Oil Co.*, 62 S. Dak. 33, 251 N. W. 187. On examination of the case and its connected cases, it having made three appearances in that court, *Standard Oil Co. v. McNenny*, 62 S. Dak. 277, 252 N. W. 841, and *Powers v. Standard Oil Co.*, 63 S. Dak. 297, 258 N. W. 134, there appears a course of procedure strikingly like that in the case now before us, the only substantial difference being that in the Dakota case, after the first determination by the supreme court and when the proceeding got back to the trial court, that court allowed the revivor, as it is here contended the district court for Lancaster county should have done, and the Standard Oil Company prosecuted proceedings in certiorari to review the order of the circuit court, which resulted in the determination reported at 62 S. Dak. 277, 252 N. W. 841. Later, in 63 S. Dak. 297, 258 N. W. 134, was determined the second appeal which had been based upon the judgment of the circuit court allowing the revivor.

In the first of the three cases the Dakota court, disregarding a suggestion as to abatement of the action by reason of the death of a party subsequent to the judgment and prior to the appeal, finds that the appeal has been taken and conducted in the name of a dead man, and states that "we are satisfied that this appeal taken and conducted in this manner gives this court no jurisdiction." Also, in the case the administrators of the deceased sought to be substituted as plaintiffs, and upon that proposition the court said:

"We are of the opinion that the court has no jurisdiction to make any such substitution. * * * In other words, the attempted appeal * * * has accomplished nothing. A. G. Powers never having been in any way before this court, so far as this action is concerned, we know of no method or procedure whereby we could bring in an entirely new party

to the action as it now stands. There is no action here pending so far as A. G. Powers is concerned. If the administrators wish to be substituted as parties in place of A. G. Powers, deceased, we are of the opinion that the procedure to effect such purpose must be had in the court below."

Following that case and upon review of the order of the trial court allowing substitution of the administrator, it appeared that the original judgment became final by expiration of the time for appeal in June, 1933, and that the application and order for substitution were made in December, 1933, the time allowed for appeal in that state being one year. It was contended there, as here, that the revival statute extended the time in which appeal could be taken for the prescribed period from the date of the death; but that court said:

"This court has consistently held that neither this court nor the circuit court can extend the statutory period for appeal. * * * We are of the opinion that said section 2317 (revivor) was never intended to regulate the time for taking appeals, and that the said section must be subordinated to the section limiting the time in which an appeal can be taken. It would be unreasonable, we believe, to read into the said statute a legislative intent which would prevent this judgment from becoming final until one year after the death." 62 S. Dak. 277, 252 N. W. 841.

In the final appearance of the case, 63 S. Dak. 297, 258 N. W. 134, the court simply refers to the former hearings and the syllabus to the case is:

"Where party to action died subsequent to entry of judgment and before year in which appeal could be taken and no appeal was taken within a year, court had no power to appoint administrators to prosecute appeal thereafter."

In the briefs and argument on behalf of appellant it is earnestly suggested that a different rule is adopted in the jurisdictions of Connecticut and Oregon as illustrated principally in the cases of *Barton v. City of New Haven*, 74 Conn. 729, 52 Atl. 403, and *McBride v. Northern P. R. Co.*,

19 Or. 64, 23 Pac. 814; and that the equities in the present case are such as should lead the court to make an exception to its established rule in reference to the enforcement of the limitation provided by the appeal statute. In an effort to distinguish many of the cases cited as authority by appellee, some of which have not been given reference in this opinion, it is urged that therein it appeared that there was ample time yet remaining within which appellant could have perfected his appeal by following proper procedure in obtaining revival before the expiration of the limited time, while it is urged in this case no such sufficient time remained.

It does appear that the cases cited from the two jurisdictions named give support to the appellant's contention, but it also appears to us that the court in so doing trespassed upon the domain of the legislature and established an exception in nowise provided for or indicated in the statute being considered.

Upon the question as to the sufficiency of time, had proper diligence been used and proper procedure followed, we cannot agree with the argument made on appellant's behalf. An examination of the record discloses that in the original case a motion for new trial was overruled March 29. From this time 40 days elapsed until the death of the defendant, May 8, and from this time there remained 52 days until June 29, the expiration of the time for appeal. This, we believe, afforded sufficient time after the death of the defendant within which a conditional order could have been made, served and become at issue before the expiration of the time for appeal. The statute, section 20-1408, Comp. St. 1929, provides that such order shall be served in the same manner and returned within the same time as a summons. It does not provide that the answer day shall be fixed as in a summons, although in this case there was also ample time for that. Even in cases where publication for four weeks is necessary, section 20-1409, the provision is that answer day shall be not less than ten days after the publication is complete, and there was in this case time sufficient

for that course to have been followed and still more than ten days left in which hearing could have been had. Doubtless the trial court, upon being advised that delay might involve the running of the statute regulating appeals and possibly the loss of the right of appeal, would have seen to it that the hearing was had in time to avoid any such result. In the instant case, however, no petition was filed for appointment of administrator in the county court until July 23, 1937, on which date a special administrator was appointed. He filed briefs in the original case before this court, but no application for revivor and substitution was lodged in the district court, the only court having jurisdiction, until December 13, 1937, which was more than three months after the overruling of the motion for new trial in the original case, likewise more than three months after the death of the defendant, and more than that time after the appointment of the special administrator and also of the general administrator.

It follows as the necessary conclusion that the original judgment in the district court of March, 1937, became and is final, and the district court in December, 1937, had no authority to allow revivor and substitution of the appellant administrator for the purpose of prosecuting an appeal from that judgment. The order and judgment of the district court is therefore

AFFIRMED.

MARGARET EILEEN SHRAMEK, APPELLANT, V. LEE HUFF, SR., APPELLEE.

280 N. W. 450

FILED JUNE 28, 1938. No. 30288.

1. **Landlord and Tenant: NEGLIGENCE: PROOF.** Use of concrete with a smooth finish in the construction of stairway and painting the steps with ordinary paint and use of sweeping compound containing oil while sweeping steps are not evidence of negligence, in the absence of a showing that the material used was

different from that used generally for similar purposes, or that it was used or applied in a negligent manner.

2. ———: ———: PROXIMATE CAUSE. While the violation of a city ordinance intended to prevent personal injury is evidence of negligence or even negligence *per se*, to be the basis of liability for injuries sustained, such violation must be the proximate cause of such injury.
3. Evidence examined, and *held* that stairway complies with requirement of city ordinance as to hand-rails.
4. Appeal. Where defendant's motion for directed verdict should have been sustained, error in assessment of damages is without prejudice.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Gaines, McLaughlin & Gaines and *L. Q. Hills,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

KROGER, District Judge.

Plaintiff commenced this action in the district court for Douglas county, Nebraska, to recover damages for personal injuries sustained by her on July 5, 1936, as the result of a fall upon a stairway in an apartment house located in Grand Island, Nebraska, and owned by the defendant. Trial was had to a jury, resulting in a verdict in favor of the plaintiff, and assessing her damages at one dollar. Plaintiff filed a motion for new trial, and from the ruling denying a new trial appeals to this court.

The principal error assigned is that, the verdict being for the plaintiff, the jury should have awarded her a substantial sum as damages. The evidence clearly establishes that plaintiff sustained substantial damages, and unless the defendant's motion for a directed verdict at the close of plaintiff's evidence, and at the close of all of the evidence, should have been sustained, the judgment appealed from

must be reversed. *Meier v. Bridgeport Irrigation District*, 113 Neb. 344, 203 N. W. 543.

The acts of negligence complained of and submitted to the jury by the trial court were (a) the construction and maintenance of an open stairway without equipping the same with two hand-rails, contrary to the ordinances of the city of Grand Island, Nebraska; and (b) constructing in said stairway a window and allowing it to be open or ajar, thus obstructing said stairway, contrary to the ordinances of the city of Grand Island, Nebraska.

Other acts of negligence charged by plaintiff in her petition and not submitted by the trial court were that the stairway was defective in that the same was constructed of an extremely smooth grade of concrete, and said steps had been painted and polished and oiled, causing them to be more slippery than ordinary; and that it was a winding stair, contrary to the provisions of the ordinances of the city of Grand Island, Nebraska.

The applicable provisions of the building code of the city of Grand Island, known as Ordinance No. 1143, provide: 1. "Inclosed stairs shall have at least one hand-rail and where the width of such stairs is greater than three feet six inches, shall have a hand-rail on each side. Open stairs shall be provided with hand-rails on each side." 2. "All stairs, except rear stairs, in new tenements, shall have risers not more than seven and three-quarters inches high and treads not less than nine and one-half inches wide, exclusive of nosing. No winding stairs nor windows in stairs shall be permitted." 3. "Stairways and Fire Escapes Not Obstructed. No obstruction of any kind shall at any time be placed before, upon, or against any stairway, steps or landing or fire escapes in or upon any tenement."

The evidence discloses that the apartment house in question was constructed after the passage of said ordinance, and that the rear stairway has a brick wall on one side and on the opposite side two iron railings one and one-half inches in diameter, and the upper one two feet four inches above tread of steps, running between four newel posts.

The width of the stair between newel post and wall is three feet five and seven-sixteenths inches, and the distance between the wall and the railing is three feet six and one-half inches. The steps, however, extend only to a point in line with the newel posts. There are French windows opening to the inside in the stairway between each floor of the apartment.

Plaintiff's evidence discloses that she and her husband had occupied an apartment on the third floor of the apartment house in question for approximately a year before the accident complained of; that on the morning of July 5, 1936, she was descending the rear stairs with her husband, who was preceding her; that the French window in the stairs between the second and first floor was standing ajar at approximately right angles with the wall; plaintiff testifies that, as she descended the stairs between the second and first floor, she was near the wall and that it was necessary for her to walk away from the wall to avoid the open window extending into the stairway; that as she stepped down onto the third step below the second floor her foot slipped out from under her causing her to fall, and as a result of the fall she suffered the injuries complained of; that at the time she slipped she was to the right of the center of the stair. The evidence further discloses that, beginning with the step below the one on which plaintiff slipped, there were two winders in the stairs.

There was no evidence that the concrete used in the construction of the step was different from that used generally in modern construction, or that it was at the time of the accident maintained in a condition different from that in general use. The evidence as to oil consisted of a showing that a sweeping compound was used when sweeping the halls and stairs, and the claim was made that this compound left an oil film on the steps causing them to be unduly slippery. There is no evidence that the compound used was different from that in general use or that it was applied in an improper manner or that any of the compound was left on the stairs. The trial court properly withdrew

the charges of negligence based on the condition of the steps, both as to material used in their construction and the condition in which they were maintained.

Whether or not the French window in the stairway was maintained in violation of the ordinance is immaterial in this case, as the window was not a proximate cause of plaintiff's injuries. Plaintiff had not reached the point where the window protruded into the stairway at the time of her fall, nor did she contact the window in any manner. This is likewise true of the winders in the stair. Plaintiff fell before she reached the winders, slipping on a step that was of standard construction, and the fact that there were winders in the stairs in no manner contributed to her injury. As was stated in the case of *Wendell v. Roberts*, 125 Neb. 619, 251 N. W. 264: "The point of contact is important. Conditions elsewhere do not matter."

This leaves but one charge of negligence, to wit, that there was an absence of hand-rails in violation of the city ordinance. The evidence discloses that there was a hand-rail on one side of the stair. The provision of the ordinance requiring hand-rails on both sides of an open stair can only be construed as applying where the stair is open on both sides. In the instant case the stair was closed on one side and open on the other; there was a hand-rail on the open side, and the width of the stair was not such as would require a hand-rail on the opposite side. Consequently there was no violation of the ordinance with regard to hand-rails.

From what has been said it necessarily follows that the trial court should have sustained the defendant's motion for a directed verdict, and since plaintiff was not entitled to recover under any circumstances, and the defendant is not complaining, any errors committed in the trial were without prejudice, and the judgment appealed from is

AFFIRMED.

HENRY GREENWALD, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE: W. DALE CLARK ET AL., INTERVENERS, APPELLEES.
280 N. W. 884

FILED JULY 1, 1938. No. 30322.

1. **Street Railways:** BONDS. A street railway company's bond, by referring to the mortgage securing it for the consequences of default in payment, when due, makes the pertinent provisions of the mortgage a part of the bond and charges the purchaser thereof with notice of such consequences.
2. ———: ———: NEGOTIABILITY. A street railway company's bond is not a negotiable instrument, where it provides that a majority of the bondholders may waive defaults and extend the time for payment and inhibits suit on the bond and on the mortgage when due.
3. ———: ———. In a street railway company's bond, an inhibition preventing suit thereon and on the mortgage securing it, when due, unless directed by the holders of 25 per cent. of the outstanding bonds, is a reasonable and valid provision.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Manhart & Buckley, Albert Harris and *Marcus Miller,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is an action at law on each of ten unpaid 1,000-dollar bonds of which Henry Greenwald, plaintiff, is the holder. They were issued by the Omaha & Council Bluffs Street Railway Company, defendant, December 1, 1902, and were payable in the state of New York January 1, 1928. Plaintiff purchased the bonds late in 1936. In the meantime, by three extensions, the time of payment was extended to January 1, 1937, the date of alleged maturity. The petition was filed March 3, 1937, and it is therein stated that the bonds are negotiable instruments payable

to bearer and that plaintiff is a *bona fide* purchaser thereof for value before maturity without notice of defects or of other defenses. It is further pleaded that plaintiff elects to proceed at law without regard to the mortgage by which the bonds were secured, no other action to collect the debt having been instituted.

Execution of the bonds by defendant is admitted in its answer which denies that they are negotiable or due; pleads in substance that the time fixed for payment was extended from January 1, 1937, until January 1, 1947; sets out in full as connected transactions the mortgage, the bonds and the extension agreements; states that the bonds by reference to the mortgage gave plaintiff notice of contingencies showing the bonds are not negotiable instruments.

The reply to the answer contains a general denial.

A jury was waived and the cause tried to the district court, where the findings on the controverted issues were in favor of defendant. From a dismissal of the action plaintiff appealed.

The vital issue on appeal is the traversed allegation that the bonds are negotiable. The negotiable instruments act provides:

"An instrument to be negotiable must conform to the following requirements: First. It must be in writing and signed by the maker or drawer; Second. Must contain an unconditional promise or order to pay a sum certain in money; Third. Must be payable on demand, or at a fixed or determined future time; Fourth. Must be payable to order or to bearer." Comp. St. 1929, sec. 62-101.

That is not all the law of negotiable instruments. The statute provides:

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." Comp. St. 1929, sec. 62-104.

Plaintiff relies on the facts that each bond is in writing and signed by defendant; that its execution and delivery are admitted; that it contains an unconditional promise to

pay a sum certain in money—$1,000; that it is payable at a fixed time—January 1, 1937; that it is payable to bearer—plaintiff; that plaintiff confines his remedy to an action at law regardless of the mortgage; that he is a purchaser in good faith before maturity; that under the pleadings, the evidence and the law the district court had no alternative but to enter judgment in his favor on the bonds for the principal and interest. It is argued that the bonds are payable to bearer and that the defense of non-negotiability and the attempt to defeat recovery by resort to the mortgage are tainted with fraud. The argument, statutes and cases cited to support these and other propositions of plaintiff have not been overlooked. There is, however, another view of the case that requires consideration.

Plaintiff bought the bonds in 1936 before the alleged date of maturity January 1, 1937. Except for the three extensions authorized by the terms of the mortgage, the bonds would have shown on their face that they matured January 1, 1928, long before plaintiff purchased them. He resorted to the mortgage through the extensions to show that he bought the bonds before they were due and ignored the consequences of a contingency arising from a default in payment, a subject treated by the mortgage in direct terms. Each bond on its face referred the holder and bearer to the mortgage in the following words:

"In case of default in the payment of this bond, or of the interest accruing thereon, or otherwise, such consequences shall ensue as are provided in the mortgage securing the payment of the same hereinafter mentioned."

Consequences of defaults in payments were called to the attention of bondholders in the following terms of the mortgage:

"Every holder of the bonds secured hereby accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, upon or under this instrument, is vested exclusively in the trustee; and under no circumstances shall the holder of any bond or coupon, or any number of such holders, have any

right to institute any action at law upon any coupon or coupons, or otherwise, or any suit or proceedings in equity, or otherwise, for the purpose of enforcing any payment, covenant or remedy herein or in said bonds or coupons contained, or to foreclose this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this instrument in respect of such payment, covenant, remedy or foreclosure after the expiration of three months after demand by the holder or holders of twenty-five per cent. in amount of the bonds secured by this mortgage and then outstanding and the production of such bonds by the holders thereof to the trustee, or the furnishing by such holders of other evidence satisfactory to the trustee that they are such holders, and the giving to the trustee of an indemnity satisfactory to it, securing it against liability by reason of the action requested, but no inaction by said trustee upon any such request shall be deemed a refusal until after the expiration of said three months for the consideration thereof by said trustee.

"In every case in which the trustee is authorized or required, under any provision of this instrument, to take any action upon the request of the holders of said bonds, the trustee shall have the right to require the person or persons presenting such request to furnish proof as to the ownership of the bonds presented by him or them by the production of such bonds or by affidavits, or other evidence satisfactory to the trustee, and if such proof be so required and the said request shall be without effect until such proof shall be furnished.

"In every case of default in the payment of the money secured, or any part thereof, or in respect to any covenant or agreement in said bonds or coupons or herein contained, the duty of the said trustee, and also its power to act in the premises, are hereby declared to be subject to the right and power of the majority in interest of the holders of the bonds hereby secured and then outstanding, to require the said trustee to waive such default or to enforce their rights thereunder, the choice of remedies, however, being left to

the trustee, but no action of the said trustee or bondholders in case of any default, shall affect any subsequent default or any right arising therefrom."

The reference in a bond to the mortgage containing the provisions quoted is effective for the purpose of making them by construction a part of the bond. The bonds and mortgage therefore authorize the bondholders to waive defaults and extend maturities. It is equally clear that actions at law on the bonds and suits in equity on the mortgage, unless brought by the trustee pursuant to the terms of the mortgage, are forbidden, unless directed by 25 per cent. of the holders of outstanding bonds—authority never granted to plaintiff. The provisions quoted from the mortgage as parts of the bonds are lawful terms which the contracting parties had power to make and gave notice to and are binding on the purchasers of the bonds. *Munch v. Central West Public Service Co.*, 128 Neb. 645, 259 N. W. 736. The contingency for which the bonds in connection with the mortgage provided and the provision in the mortgage forbidding an action on the bonds at the time therein fixed for payment, unless directed by 25 per cent. of the holders of outstanding bonds, made the instruments on which plaintiff sued non-negotiable within the meaning of the negotiable instruments law. Moreover, the record shows that, without the individual consent of plaintiff, the time for payment of his bonds was extended until January 1, 1947. Plaintiff did not prove fraud in the sale of the bonds or in extensions of times for payments or in the provisions of the mortgage or in the defenses to the action at bar. The dismissal was the only judgment that properly could have been rendered on the record for review. There is no ambiguity or inconsistency in the instruments under consideration to call for an analysis of the decisions of the courts of New York, the state in which the bonds are payable. In view of the conclusion reached on the vital issue, discussion of other questions becomes unnecessary.

AFFIRMED.

CHARLES HALL V. STATE OF NEBRASKA.
280 N. W. 847

FILED JULY 1, 1938. No. 30375.

Criminal Law. It is not reversible error to fail to instruct the jury on the defense of an alibi when no request to charge on that feature of the case has been tendered to the court.

ERROR to the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Boyd P. McGuire and *George Gorder,* for plaintiff in error.

Richard C. Hunter, Attorney General, Harry S. Grimminger, John G. Tomek and *Robert G. Fuhrman, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

PAINE, J.

The plaintiff in error was convicted of uttering and publishing a forged check in the amount of $275, and was sentenced to two years in the penitentiary and to pay a fine of one dollar and costs, and he is now serving such sentence.

The plaintiff in error has been represented by several different counsel. Cecil R. Boughn was his counsel in the hearing in the county court on April 2, 1937, and also in the trial in the district court, having been appointed upon a poverty affidavit. On October 20, 1937, he filed a motion for new trial, and the next day filed his resignation as counsel. On November 12, 1937, Boyd P. McGuire was duly appointed counsel for plaintiff in error, and on the same day asked leave to amend the motion for new trial by adding an additional ground of newly-discovered evidence, supported by several affidavits. The motion for new trial was overruled, and the clerk of the court directed to prepare a transcript, and the court reporter to prepare the bill of exceptions, which, with cost of printing briefs, were taxed to Thurston county. The argument in the supreme court on behalf of the plaintiff in error was made by attorney George Gorder, of Sioux City, Iowa.

The testimony showed that Leonard Doffin, a farmer residing near Wisner, sold a team of horses to a stranger in Pender, Nebraska, for $275; that the purchaser produced a check, exhibit No. 1, signed in ink, "Frank B. Baughman," but otherwise blank, and that the purchaser referred to the maker of the check as his "daddy-in-law," and filled in the amount and the seller's name and the word "team," in lead-pencil, and received the team of horses for such check. The seller deposited the check in his bank in Wisner, but it was later returned by the Home State Bank of Homer, upon which it was drawn, with the words, "No account 76-1283," written across the face of the check. At the trial D. G. Evans, the banker who made this notation, testified that it meant that they did not have any such account in the bank. He further testified that he had lived in that county for 35 years and never heard of a man by the name of Frank B. Baughman in that community.

The purchaser of the horses had a commercial trucker take them to Dakota City, where they were unloaded and sold by him to Louis W. Madison for $150, who sold them the next day for $193.

Charles Hall, the plaintiff in error, testified that he had lived in Sioux City since 1921, and was a married man, engaged in peddling fruits, vegetables, potatoes, apples, etc. He testified he had not been in Pender for over three years, and said he had never seen Mr. Doffin until after his arrest.

He describes his arrest in this way: That they had recently passed an ordinance in Sioux City, and published it in the newspaper, which required any one who had been convicted of a felony to register at police headquarters; that in 1928 he had been convicted of an assault to do great bodily injury, and while it was not a penitentiary sentence, still he thought he had better go and register, which he did, and after he had been fingerprinted and "mugged," officer Farley told him that the sheriff in Pender wanted to see him, and claimed he had stolen a team of horses. Continuing his testimony, he said: "And I said, 'Morris, I got an education, I have been to college, I'm not an imbecile, a

fool. If I stole the horses would I walk into the police station?' " However, he was held several hours, and the sheriff finally came from Pender with others, and after he had walked across in the "show-up" the witnesses hesitated, then they went to his home and got his own sheepskin coat and cap and had him put them on; then some of the four men from Pender identified him positively as the man who had passed the check, and he was arrested, but he has at all times denied his guilt.

The brief of plaintiff in error sets out, as propositions of law which require a reversal, that the verdict is not sustained by the evidence, that the court erred in overruling the motion for a new trial, in spite of the many affidavits setting out newly discovered evidence, and the principal objection is that the court failed to instruct the jury on the one defense interposed, which was an alibi.

Counsel for plaintiff in error argued to this court that the defendant had only one defense in this case, and that was the defense of an alibi, which witnesses gave evidence upon in his behalf, and yet the court gave no instructions whatever on alibi. It is insisted that it was a legitimate defense and, being the only one he had, the court should have told the jury its effect, and how it should be considered by the jury. The court simply instructed that he pleaded not guilty and was presumed to be innocent until proved guilty beyond a reasonable doubt.

In support thereof, we are cited: "Where one defense is mainly relied upon, and evidence is introduced to sustain it, it is error for the court to omit to call the attention of the jury thereto, whether or not it is requested so to do." 16 C. J. 1057.

In *Ferguson v. State,* 52 Neb. 432, 72 N. W. 590, this court held: "It is not reversible error to fail to instruct on the subject of an alibi, where no request to charge upon that feature of the case has been tendered." This holding of the court has since that time been supported by the following decisions: *Heidelbaugh v. State,* 79 Neb. 499, 113 N. W. 145; *Bloom v. State,* 95 Neb. 710, 146 N. W. 965. No

requested instructions were submitted by plaintiff in error to the court at the trial in the case at bar.

We have said that the defense of alibi arises when there is evidence that the accused was at a point where he could not have been guilty of participating in the offense, and if his evidence is strong there arises in the minds of the jurors at least a reasonable doubt that he committed the crime. *Huckett v. State*, 121 Neb. 364, 237 N. W. 159.

While the holdings in all of the courts cannot be reconciled, yet the majority of the courts hold that alibi evidence is not to be considered by itself, but in connection with all the other evidence, and that alibi is not an independent affirmative defense in the same sense that insanity is regarded as an affirmative defense. Annotation, 67 A. L. R. 138. Therefore, it was not error for the court to fail to give the jury an instruction on alibi.

Furthermore, in examining the motion for a new trial, filed by the first attorney who represented the plaintiff in error, the failure of the court to give an instruction on alibi was not raised in any way, and we do not believe it needs to be further considered.

We have carefully examined all of the other errors set out, and find no prejudicial error in the record. The judgment and sentence of the court are therefore

AFFIRMED.

DEPARTMENT OF BANKING, APPELLEE, V. PHIL L. HALL, JR., ET AL., APPELLANTS.
280 N. W. 844

FILED JULY 1, 1938. No. 30341.

1. **Limitation of Actions:** BANKS AND BANKING. A cause of action against an officer and director of a bank for fraudulently diverting its assets to his own use or to the benefit of a third person must be brought within four years from the discovery of the fraud. Comp. St. 1929, sec. 20-207.
2. ———: ———. Such a cause of action accrues as soon as

the diversion is complete, in the absence of a concealment of the facts on the part of such officer and director.

3. ———: ———. The running of the statute of limitations is not delayed until plaintiff can procure evidence to sustain his cause of action.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Reversed and dismissed.*

Dwyer & Dwyer, Gaines, McLaughlin & Gaines and *L. Q. Hills,* for appellants.

Robert H. Downing, G. F. Nye, F. C. Radke and *C. G. Miles, contra.*

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

CARTER, J.

This is an action at law brought by the department of banking against Phil L. Hall, Jr., Vedah W. Hall, his wife, and the American Surety Company, surety for the Halls, to recover damages for alleged fraudulent and dishonest acts of the defendants while operating the Greenwood State Bank. From judgments in favor of the plaintiff, the defendants appeal.

The defendant Phil L. Hall, Jr., during all the times hereinafter mentioned was the president of the Greenwood State Bank. The defendant Vedah W. Hall was a clerk and bookkeeper in the bank during the time that the acts complained of took place. At the time that Hall came into the bank, the bank carried among its assets an obligation owed by Sheffer & Jardine in the amount of $27,000. This amount was reduced by a $4,000 payment made by Jardine and by a further payment of $15,000 made by Sheffer by mortgaging 190 acres of land. The balance was represented by notes signed by Sheffer and his wife in the amounts of $5,350, $100, $624 and $2,126, including interest, and secured by mortgage liens subsequent to the $15,000 first mortgage. It appears that the banking department objected to the latter item, the note in the principal amount

of $2,000, and the defendant Phil L. Hall sold it to his mother, Helena B. Hall, her account in the bank being reduced by a corresponding amount.

It further appears that Sheffer was unable to pay interest and taxes, with the result that an agreement was entered into whereby a public auction of the land was had. The bank bid in the land at $117 an acre and it was carried on the books of the bank as "other real estate" in the amount of $8,200, subject to the first mortgage of $15,000.

On February 9, 1931, the bank became possessed of four school district warrants of the face value of $2,075. The defendant Phil L. Hall testified that he was advised by the banking department that the warrants were not properly issued by the district and that they could not be carried as assets of the bank. The defendant Phil L. Hall thereupon repurchased the $2,000 note from his mother, Helena B. Hall, and on February 10, 1931, sold the school district warrants to her. Subsequent developments proved the $2,000 note to be of no value, while the school district warrants were paid in full. Plaintiff contends that the transaction was a fraud upon the depositors of the bank and that this action was subsequently commenced to recover damages for the alleged fraud.

It is not disputed that the transfer of the warrants to Helena B. Hall appears upon the books of the bank under date of February 10, 1931, and that this action was commenced on October 19, 1935, more than four years thereafter. Defendants contend that the action was barred by the statute of limitations. Plaintiff contends that the auction sale was not held in good faith and that the action of Hall in causing the land to be bid in at $117 an acre concealed the worthlessness of the $2,000 note and that the statute did not commence to run until January 20, 1932, when the true character of the auction sale is alleged to have been first discovered.

The Greenwood State Bank became insolvent and was taken over by the banking department for liquidation on or about January 15, 1934. As such receiver, the depart-

ment of banking occupied a fiduciary relationship with the creditors of the bank. This court has held that directors of a corporation hold the property of the corporation for the benefit of creditors but only under a trust that is implied or constructive in nature and not such as to bar the statute of limitations. *Department of Banking v. McMullen,* 134 Neb. 338, 278 N. W. 551. That the receiver takes the property of the corporation subject to the conditions and legal disabilities with which it was burdened in the hands of the directors of the corporation is well settled. *Torgeson v. Department of Trade and Commerce,* 127 Neb. 38, 254 N. W. 735.

The evidence shows that the sale of the school district warrants to Helena B. Hall was complete on February 10, 1931, and the transaction was shown on the books of the bank on that date. In a similar case, *Cooper v. Hill,* 94 Fed. 582, the court said: "The contention of the appellee that the cause of action for fraud is not barred by this statute, because the time under it does not commence to run until the discovery of the facts constituting the fraud, has been considered. But the salient facts of this case were spread upon the books of the bank. They were all known in October, 1889, to the cashier, Clinton, who succeeded Cooper when he made the record of the resolution for the reconveyance of the mining property; and Clinton had no interest in this matter adverse to the bank, and he was its chief officer and agent. Notice to him was notice to his principal, the bank. There was no concealment, no secrecy, no deceit, in the acts of the appellant; and the time, under this section of the statute, commenced to run when the diversion of the fund was complete. In this state of the facts the receiver and the creditors and stockholders of the bank, whom he represents, stand in its shoes. Their rights here are merely those of assignees of the bank, and as such they have acquired no cause of action which the bank did not have before the receiver was appointed."

In the instant case, the transaction complained of was completed on February 10, 1931. It appears upon the books

of the bank as of that date. There was no concealment of the facts surrounding the transaction. The running of the statute is not delayed until plaintiff can procure the evidence to maintain the action. The plaintiff's cause of action accrued on February 10, 1931, and the statute of limitations commences to run from that date. See *Department of Banking v. McMullen, supra.* This action, not having been commenced within four years from that date, is barred by the provisions of section 20-207, Comp. St. 1929.

The plaintiff further contends that the auction sale of the Sheffer land, held in November, 1930, amounted to a fraud for which the defendants Hall must respond in damages. It is claimed among other things that a *bona fide* bid of $115 an acre was made by one Olof Olson, and that the acceptance of that bid would have paid off all the liens against the land, including the $2,000 note involved in this action. The record discloses that the Olson bid was made to encourage the bidding and with no intent on the part of Olson to buy the land. The bid was made pursuant to an arrangement with a representative of the bank. The land was finally bid in by John Wiedeman for the bank in the amount of $117 an acre. The evidence shows that there was no *bona fide* bid made in excess of the amount of the first mortgage. There is no evidence in the record that the Sheffers were able to pay a deficiency judgment, if one had been obtained. We necessarily come to the conclusion that the creditors of the bank were in no way damaged by the action of the bank's officers in buying the land to protect their second lien. In any event, the whole transaction was set up on the records of the bank on February 10, 1931. What we have said in the fore part of this opinion with reference to the statute of limitations applies with equal force to the alleged fraudulent land sale. The claim for damages growing out of the sale of the land to the bank is likewise barred by the statute of limitations.

The statute of limitations was pleaded as a defense and a motion for a directed verdict was made by each of the defendants at the close of all the evidence on the ground

that the evidence disclosed that the statute of limitations was a bar to the action. We think that this motion should have been sustained. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

ERNEST BONNER, APPELLANT, V. JOHN J. PSZANOWSKI ET AL., APPELLEES.

280 N. W. 843

FILED JULY 1, 1938. NO. 30257.

Habeas Corpus. Where the regularity of proceedings in habeas corpus is not attacked on appeal, and where there is a substantial conflict in the evidence as to petitioner's presence in or absence from the demanding state at the time the offense is alleged to have been committed, the petitioner is not entitled to his freedom on that issue.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Lower & Sheehan, for appellant.

James T. English and *James J. Fitzgerald, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

MESSMORE, J.

This is an appeal from an order of the district court for Douglas county, denying the petition of applicant for a writ of habeas corpus.

Appellant's petition alleges his citizenship in Douglas county, the unlawful deprivation of his liberty by the police in the Omaha city jail, the arrest and detention of appellant without filing of a complaint or information, without the issuance of a warrant, and without cause. The answer admits the detention of appellant by appellees, based upon authority of an extradition warrant issued after proper proceedings by the governor of Nebraska; legality in form

and as provided by law for extradition proceedings; denies unlawful detention and unlawful deprivation of liberty; admits identification of appellant as same person named in extradition warrant by initials and alias of E. C. Ross. The reply is a denial of the allegations of the answer and return and of the issuance of extradition warrant and hearing before the governor at the time the writ of habeas corpus was issued and served; denies that the applicant was a fugitive from justice in Ohio on or before June 6, 1936; alleges appellant's residence at 1721 Davenport street, Omaha, Nebraska; also that the appellant was engaged in conducting a race book at 1914 Farnam street in Omaha, and was present in Omaha for some time prior to June 6, 1936, and that on said date he attended the funeral of his mother-in-law; and denies the legality, authenticity or correctness of proceedings attached to the answer and return, and that the proceedings referred to appellant.

The appellant was wanted in Madison county, Ohio, in connection with a robbery of one Troy W. Hayes, a resident of said county, who had drawn $900 from the bank to make a payment on a farm which he was purchasing. Two strangers were near Mr. Hayes at the time of his withdrawal of funds from the bank. They contacted Mr. Hayes and made arrangements with him to pasture three race horses. They subsequently went to the Norwich Hotel in Columbus, Ohio, and there got into a card game. They borrowed some money of Mr. Hayes and subsequently robbed him. One of the three men is serving a term in the Ohio penitentiary for the offense. The appellant contends that he was not in Columbus, Ohio, on the day the robbery occurred, but was attending his mother-in-law's funeral in Omaha, Nebraska, June 6, 1936, the date of the robbery in Ohio, and produced several witnesses to corroborate his testimony. Relatives and friends did testify positively that the appellant was in the city of Omaha on June 6, 1936. *Contra* to this testimony was that of identification at the police station in Omaha, where Mr. Hayes identified the appellant; also the testimony of a police officer that appel-

lant's driver's license was found in the hotel room where the robbery occurred a half hour thereafter; also an admission by appellant that he had an acquaintance with the two other men, and that he had been in Columbus the latter part of June, but not in the fore part of that month, and evidence that the appellant had been previously convicted of a felony.

Appellant claims that the evidence adduced by him is sufficient to warrant the conclusion that he was not in the demanding state at the time of the alleged robbery of Hayes, and by his evidence seeks to prove an alibi. The record discloses that there is a substantial conflict in the evidence as to petitioner's presence in or absence from the demanding state at the time the offense is alleged to have been committed.

No specific assignments of error are set forth in the appellant's brief. The regularity of the proceedings is not questioned, and a review thereof discloses that they are not subject to question.

In *Chandler v. Sipes,* 103 Neb. 111, 170 N. W. 604, we held: "In habeas corpus, where there is a substantial conflict in the evidence as to petitioner's presence in or absence from the demanding state at the time the offense is alleged to have been committed, petitioner is not entitled to his freedom on that issue."

In the opinion in *Munsey v. Clough,* 196 U. S. 364, 375, 49 L. Ed. 515, we find this language: "But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused." The court further said: "When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state,

then the court will discharge the defendant"—citing *Hyatt v. People,* 188 U. S. 691, affirming the judgment of the New York court of appeals, 172 N. Y. 176, 64 N. E. 825.

In 29 C. J. 78, we find this language: "The court will not discharge a defendant arrested under an extradition warrant where there is merely contradictory evidence on the subject of presence in, or absence from, the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of accused." See *Chandler v. Sipes, supra.*

In the case of *Hoagland v. State,* 129 Neb. 6, 260 N. W. 695, this court held: "In habeas corpus, the burden is on petitioner to prove his detention is unlawful."

The order of the trial court denying the writ of habeas corpus to appellant is

AFFIRMED.

PAUL CROSS, APPELLEE, V. ALBERT J. THEOBALD, COUNTY TREASURER, APPELLANT: STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, INTERVENER, APPELLANT.
280 N. W. 841

FILED JULY 1, 1938. No. 30407.

1. Statutes: CONSTRUCTION. "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *State v. First State Bank of Alliance,* 122 Neb. 502, 240 N. W. 747.
2. Automobiles: LICENSES. Chapter 141, Laws 1937, examined, and *held* to require license fee of 75 cents from all applicants holding a motor vehicle operator's license on September 1, 1937.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Richard C. Hunter, Attorney General, Edwin Vail, Harry S. Grimminger and *Edmund P. Nuss,* for appellants.

J. E. Ray, contra.

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

KROGER, District Judge.

Paul Cross, as relator, filed his petition and affidavit for mandamus against Albert J. Theobald, county treasurer of Adams county, Nebraska, setting out that on September 1, 1937, he was the holder of a valid unrevoked motor vehicle operator's license issued by the state of Nebraska; that on December 11, 1937, he made application to the director of motor vehicles for an operator's license pursuant to chapter 141, Laws 1937; that his application was approved and said director and his agents gave relator a certificate certifying that he had complied with all of the requirements of the law and was entitled to an operator's license; that on December 14, 1937, relator took said certificate, together with the motor vehicle operator's license which he held on September 1, 1937, presented the same to the respondent as county treasurer of Adams county, Nebraska, together with a fee of 75 cents, and demanded a motor vehicle operator's license as provided by law; that the respondent, as such treasurer, demanded a fee of one dollar and refused to issue a license for 75 cents. Relator alleged that, notwithstanding the fact that he had fully complied with all the requirements of the law, he has been prevented and denied the right to operate a motor vehicle within the state of Nebraska, that he had no adequate remedy at law, and prayed for an alternative writ to issue. Alternative writ was allowed, and on the day set to show cause the state of Nebraska was permitted to intervene in said action, and thereupon filed a demurrer, which was overruled, and leave was granted to file answer. The answer of the respondent, Albert J. Theobald, county treasurer, admits the allegations of relator's petition and the writ of mandamus, and alleges that he demanded a fee of one dollar from the relator because he was informed by the state authorities that the proper fee in such cases was one dollar, and further alleges that he made such charge and demand in good faith. The

answer of the state of Nebraska, as intervener, denies the allegations contained in the petition and writ, and for affirmative answer alleges that from and after December 1, 1937, the correct and proper fee under the law was one dollar. Trial was had to the court on the issues thus joined and the facts were found to be as set out in relator's petition, and the trial court found the proper fee to be 75 cents and entered judgment accordingly. From the overruling of the motion for new trial this appeal is prosecuted.

The first assignment of error is that mandamus is not the proper remedy for the reason that relator had an adequate remedy at law, the claim being made that relator could have paid the amount demanded under protest and then filed his claim under the provisions of section 77-1923, Comp. St. 1929. The answer to that contention is that the fee prescribed for the issuance of a motor vehicle operator's license is not a tax payable to the county, but according to the provisions of section 17, ch. 141, Laws 1937, all except five cents thereof is remitted by the county treasurer to the state treasurer to be credited to the "Motor Vehicle Operator's License Fund."

It was further argued that the relator prosecuted this action in his individual capacity instead of in the name of the state of Nebraska, and therefore the writ should have been denied. During the argument of this case, the respondent waived any error, if error there was, with reference to the manner in which the action was brought, and the state of Nebraska, as intervener, is not in position to complain.

This leaves but one question which was the real issue presented to the trial court, and that is the proper fee which the county treasurer was entitled to demand from the relator before issuing to him a motor vehicle operator's license.

We have carefully examined chapter 141, Laws 1937, and find that in section 16 thereof applicants for operators' licenses are placed in two classes. In class one are all of those who held operators' licenses on September 1, 1937, the effective date of the act. In class two are all other ap-

plicants. It is further provided that the county treasurer shall collect a fee of 75 cents from each applicant in class one and a fee of one dollar from each applicant in class two. At no place in the entire act do we find any provision whereby this classification or the fee to be collected is in any manner changed. But it is argued by the attorney general that because section 28 of the act provides that "This act shall take effect on the first day of September, 1937, and ninety days thereafter shall be allowed for procuring of licenses," all those who failed to obtain their licenses within the ninety-day period lost whatever rights they had under the old operator's license and became a part of class two. Had the legislature intended what the attorney general is now contending for, it would have been a simple matter to have so stated. There is no ambiguity in the provision as written, and it clearly shows an intention to collect 75 cents per applicant from all of those holding operators' licenses as of September 1, 1937, and to collect one dollar from all those applying for operators' licenses who did not have a license on September 1, 1937. Section 28 does not purport, in any manner, to change the license fee, but postpones the date after which the driver of a motor vehicle could be prosecuted for operating the same without an operator's license. There is nothing in the act from which the court would be justified in drawing the inference that the legislature intended, after the ninety-day period, that a higher fee be charged those holding operators' licenses on September 1, 1937.

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application." 25 R. C. L. 957, sec. 213. See *State v. First State Bank of Alliance,* 122 Neb. 502, 240 N. W. 747.

"Where the language of a statute is clear and unambiguous it should be given effect according to its plain terms." *Gibson v. Peterson,* 118 Neb. 218, 224 N. W. 272.

"When the language of a statute is clear and unam-

biguous, courts will not by construction usurp the function of the law-making body and give it a meaning not intended or expressed by the legislature." *State v. Bishop*, 123 Neb. 481, 243 N. W. 658.

The judgment of the trial court was right and is

AFFIRMED.

FLORENCE JOSEPHINE FREADRICH GOODWIN, APPELLEE, V. LORENCE R. FREADRICH, EXECUTOR, ET AL., APPELLANTS.
280 N. W. 917

FILED JULY 2, 1938. No. 30192.

Specific Performance. Evidence contained in the record examined, and *held* insufficient to establish the contract alleged in plaintiff's petition, and insufficient to entitle plaintiff to a specific performance thereof.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Peterson & Devoe, for appellants.

Field, Ricketts & Ricketts and *Ross D. Netherton, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

EBERLY, J.

This is a suit in equity by Florence Josephine Freadrich Goodwin, a daughter of Charles H. Freadrich, deceased, against Luella Freadrich, widow of the deceased, Lorence R. Freadrich in his individual capacity, and as executor of the estate of Charles H. Freadrich, deceased, and as trustee of trust created by the terms thereof, O. R. Martin, trustee, and Claire J. Freadrich, defendants.

The plaintiff seeks to specifically enforce an oral contract alleged to have been entered into for her benefit on or about the 15th day of January, 1912, by and between her father, Charles H. Freadrich, and Edith Freadrich, her mother, whereby, in consideration of the oral promises of Edith

Freadrich, said Charles H. Freadrich orally promised that he would, at his death, leave his entire estate to the plaintiff, his daughter, then of the age of about 7 years, excepting only the amount his wife, Luella Thorne Freadrich, whom he had married May 23, 1911, would receive by law. Plaintiff alleges full performance of the oral agreements made by and on the part of Edith Freadrich, but that on January 14, 1933, Charles H. Freadrich made and executed his will which was not in accordance with the oral agreement of January 15, 1912, and operated as a breach thereof; that he subsequently died; that on June 5, 1935, such will was duly proved, allowed and admitted to probate by the county court of Lancaster county, Nebraska, as the last will of the deceased; that the defendants named are beneficiaries under this will.

All defendants answered, and issues were joined. The statute of frauds was one of the defenses pleaded.

A trial in the district court resulted in findings and judgment generally for plaintiff, and for the specific enforcement of the oral contract as to all defendants, except the defendant Lorence R. Freadrich. The trial court, as to Lorence R. Freadrich, entered a decree finding generally on the issues joined in his favor, and, as to him, against plaintiff.

All defendants appeal, and plaintiff prosecutes a cross-appeal so far as the decree entered is adverse to her claims.

The appeal and cross-appeal bring the issues to this tribunal for trial *de novo*. Upon this record, by statute, we are required to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court *or the fact that there may be some evidence in support thereof.*" (Italics supplied.) Comp. St. 1929, sec. 20-1925. See, also, *Ericson v. Nebraska-Iowa Farm Investment Co.*, 134 Neb. 391, 278 N. W. 841.

The record discloses that Edith Waterman, now Edith Shogren, and Charles H. Freadrich were married in April, 1903, at Lincoln, Nebraska. Florence Josephine Goodwin,

nee Freadrich, was born of this marriage on January 19, 1905. On October 6, 1908, in an action commenced in the district court for Lancaster county by Edith Freadrich, a decree of divorce was entered in her favor awarding the custody of plaintiff to her, but providing that Charles H. Freadrich should have the right to visit the child and to have the child visit him at suitable and convenient times to be agreed upon between the parties.

This decree of divorce also provided:

"5. That said plaintiff will not permanently remove said child from out of the jurisdiction of this court, but is only permitted to take the child when upon a visit and not for the purpose of thwarting the jurisdiction of this court over the child and is enjoined therefrom."

Paragraph 6 of this decree further provided that Charles H. Freadrich should pay to Edith Freadrich for the support and maintenance of the child the sum of $12.50 a month for the period of two years, and $15 a month for the next three years thereafter, and also, in the event that the parties to the suit could not then agree on the amount to be paid, the court reserved jurisdiction to fix the sum of support money and maintenance according to the means and the ability of the defendant.

On June 11, 1909, a further action was instituted by Charles H. Freadrich in the district court for Lancaster county against Edith Freadrich and her father, Joseph H. Waterman, and his wife, alleging, among other matters, that Edith Freadrich had left the child with Joseph H. Waterman and wife, who were about to leave the city of Lincoln and take the child out of the state and out of the jurisdiction of the court, and praying that such removal be enjoined. On June 16, 1909, a decree was entered in said cause whereby the first decree of divorce entered in the case of Edith Freadrich v. Charles H. Freadrich was modified so that the custody of said child was awarded to Joseph H. Waterman, and the remaining parts of the decree were to remain unchanged. These proceedings left the permanent injunction embodied in the decree of October 6,

1908, against the permanent removal of the child by her mother, Edith Freadrich, from out of the jurisdiction of the district court for Lancaster county in full force and effect; continued the provisions for the payment of support and maintenance moneys as also provided therein, and also the provision thereof retaining jurisdiction by that court for the purpose of determining future payments if such were required.

The record, however, discloses that Florence Josephine Freadrich was permanently removed by her grandfather, Joseph H. Waterman, to Galesburg, Illinois, in contravention of the decree of the district court for Lancaster county, in June, 1910. It also appears that after this removal there was no attempt to enforce the payments provided by this decree, though so far as disclosed by the evidence before us the decree was never satisfied of record.

After the granting of the divorce, Edith Freadrich sought and found employment outside of the state of Nebraska. In April, 1910, she married a Mr. Speilman in St. Joseph, Missouri. They made the city of Chicago their family home. There, for a few months, they were joined by plaintiff in this case. Mr. Speilman was soon taken sick with tuberculosis. He died in the latter part of the year 1911. During this year Edith Speilman, formerly Freadrich, had been employed in Detroit, Michigan. The evidence discloses that she terminated her employment in Detroit and came to Galesburg, Illinois, to be with her daughter on the latter's birthday. Mrs. Edith Shogren, formerly Freadrich, furnishes the sole testimony with reference to the actual making of the contract here in suit. She testifies wholly unaided by any contemporaneous written record or memorandum, substantially, as follows: That Charles H. Freadrich had written her mother then living at Galesburg, a letter, which was not preserved; that subsequently he came to Galesburg, Illinois, and that they had a conference "just before my daughter's birthday in January, 1912;" that her best recollection is that this conference occurred in the second week in January, on the 12th or 14th of that month, at the

Union Hotel in Galesburg, Illinois; that after a talk over the telephone with Freadrich just before mid-day, she went to the Union Hotel in company with her daughter, plaintiff in this case, and a conference extending from four to four and a half hours followed; that her daughter was present during the entire conversation. However, no other witness testifies to Charles H. Freadrich's presence in Galesburg, or his absence from his home at Lincoln, at this time.

The following is a summary of the testimony of this witness as to the conversation that occurred between her and Freadrich relating to the alleged making of an oral contract, upon which the present action is founded, viz.:

"Well, I asked him if it would be possible for him to help me with Josephine at that time, I was in very bad circumstances. * * * Q. Tell just what you said and he said. * * * A. And he said, 'No,' and I said, 'Why can't you, aren't you doing better in your business?' and he said, 'Yes,' but he had other obligations; and I said, 'Well,' I said, 'there is some back money that you have owed and that I could use very nicely now,' and I asked him if he couldn't see that he could help me some, but he said, 'No,' and he volunteered this then: 'If you will take care of Josephine until I get going well in my business, then we will make an agreement between us,' and I said, 'Just what kind of an agreement?' I wanted him to state what kind it would be. I said, 'Just what kind of an agreement?' and he said, 'Well, if you will waive all claims in regard to anything you might feel I owe you and if you will waive all claim of bringing any action in any court against me for any future support for her I will make her my heir. There can't be any other children and Josephine will be my heir to three-fourths of my estate; according to the law of Nebraska I have to give my widow, if I should die, one-fourth of the estate and the rest will go to my child, and there can't be any other children and she will inherit that.' * * * Q. You mentioned anything that might be due you at that time. Do you have any definite recollection how much had accrued to you and remained unpaid on child support at that time? A. About

$750, I would judge. Q. Now, was there any discussion about the education of the child? A. Yes; I was to assume that full responsibility and give her to the best of my ability her care and her education; I didn't assume a college education, I just said I would do the very best I could. Q. What, if anything, did he ask you to do in respect to that, the education of the child? A. He didn't specify any particular education I should give her, he just expected me to assume full responsibility for her. Q. I am not asking what he expected, give us his words? A. His words were if I would assume that part he would make her his heir, that would be my part of the obligation and that his would be the other. Q. What discussion, if any, was there as to his then financial condition? A. He said his business had been progressing, but that he needed his money to put in his business as he went along and that he wasn't in a position to help. Q. Was anything said that you recall as to his probable future worth? A. Oh, yes; he said he expected at some time he was going to have a big business, he said he wanted to expand and he believed he had a wonderful future; he said, 'I am not going to stand still, I am going to progress,' and if he did Josephine would benefit by it,—Florence, he called her. * * * Q. Was anything said in the discussion at all about the right of visiting the child or anything of that kind? A. Yes. Q. Tell the court just as fully and accurately as you can what was said. A. He asked me if he might have access to the child any time she was old enough to come to see him or if he was going through where I was and wanted to come to see her if I would object to that, and I said, 'Certainly not, you would have access to her at any time.' * * * Q. In the early part of the conversation was there any discussion of doing anything for your parents or his own parents? A. His own parents but not mine. Q. What was that? A. He said his father and mother were getting older all the time and that they were not in real good circumstances and that was part of his obligations, he felt he should look after his father and mother. Q. Did you make any comment on that? A. I

told him he most certainly should, his mother should come ahead of every one. * * * Q. At the conclusion, just before you broke off the negotiations with him at that time how did you leave things, that is, what was said between you and him as to these various points you have mentioned? * * * A. Well, I said to him I would live up to what he asked me to do, that I would try the best I could, if my health would permit, to care for her, clothe her and educate her, and he said in return,—do you want me to quote again? A. Yes? A. He said there could be no children with him and she would be his only child heir and that she would come in at his death to three-fourths of his estate and his wife one-fourth. Q. Was anything said about a will? A. Nothing was said about a will, I asked him if he would put it in black and white. Q. What did he say? A. He said, 'No;' that he thought his word was sufficient."

This constitutes the sole direct evidence of the making of this alleged oral agreement or the terms thereof, though the witness testifies that her daughter, the plaintiff herein, was present during the entire conference, and that the daughter then made up with her father and sat upon his lap, and spent the entire conference time in his presence. The plaintiff testifies that she has no recollection whatever of this incident, of seeing and meeting her father at Galesburg, Illinois, in January, 1912. The record contains a letter written by plaintiff on December 27, 1912, to her father, thanking him for Christmas presents just received. A large number of her letters written subsequently also appear in the record. In none of these is to be found any reference to meeting her father at Galesburg, Illinois, in 1912. Indeed, in a letter addressed to her father under date of August 22, 1917, written in her own handwriting, plaintiff says, in part: "You see I don't know you and wouldn't of known you on the street and you can't blame me for being so when I haven't seen you for eight years." The "eight years" carries the time back to the year of the conclusion of the divorce litigation at Lincoln, Nebraska.

As we now proceed to discuss the evidence, we are here

met with the preliminary objection that Edith Shogren was incompetent to testify as to alleged transactions and conversations between her and Charles H. Freadrich, now deceased, during his lifetime. The transactions and conversations testified to by this witness occurred after the marriage relations that once existed between these parties had been severed. She is not a party to the present litigation and her undisputed evidence is that she will not gain by the result thereof if her testimony given prevails. Under these circumstances, her competency as a witness is not subject to challenge under the terms of our disqualifying statutes. *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829; *In re Estate of Tilton,* 129 Neb. 872, 263 N. W. 217.

Nevertheless, it is not to be forgotten that this testimony, coming from a witness not disinterested, related to an extended conversation that is alleged to have taken place more than 25 years prior to the day on which the evidence was received in the trial court. No note or memorandum of the meeting appears to have been reduced to writing by either of the parties said to be present. At best we have to contend with the frailties of the human memory. On this general subject Felix Arnold, a psychologist of established reputation, has said that one-half of all the new matter presented to the average mind is forgotten after the first half-hour; two-thirds within nine hours; three-quarters within six days, and four-fifths of all the new matter presented to the average mind is utterly forgotten after one month. Without making a definite application in the instant case, it must be admitted, viewing the record before us as an entirety, that the witnesses for the plaintiff as to important matters connected with the merits of this case have, to a large degree, established the general truth of the conclusion quoted. So, too, the general nature of the evidence before us invokes consideration of the following principles announced in *Johnson v. Kern,* 117 Neb. 536, 546, 225 N. W. 38, viz.:

" 'Courts of justice lend a very unwilling ear to statements of what dead men have said.' *Lea v. Polk County*

Copper Co., 21 How. (U. S.) 493. 'Unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest kind of evidence.' *Lippert v. Pacific Sugar Corporation*, 33 Cal. App. 198. Where statements were made in loose, casual or random conversation the supreme court of Iowa has announced the conclusion that: 'No species of testimony is more dangerous, or received with greater caution.' *Cooper v. Skeel*, 14 Ia. 578, 581. As applicable to the subject of proof of admissions of declarants, Corpus Juris, after a discussion of the obvious weakness of this class of testimony, in general, continues as follows: 'Exposed to all the infirmities just mentioned and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny.' 22 C. J. 291, sec. 319. In principle our own authorities are in substantial accord with the rule thus expressed. *Overlander v. Ware*, 102 Neb. 216; *Williams v. Miles*, 68 Neb. 463; *Clark v. Turner*, 50 Neb. 290."

The controlling evidence quoted must also be considered in the light of the circumstances that then surrounded the participating parties. In the month of January, 1912, Charles H. Freadrich, in partnership with his brother, was conducting a retail grocery business in Lincoln, Nebraska. This business venture was commenced in 1906 and continued as a partnership until 1929. On January 1, 1912, the net worth of Freadrich Brothers was approximately $4,000. Charles H. Freadrich then had no assets other than his interest in the partnership, which was a half interest. On the judicial records of Lancaster county, Nebraska, appears an unsatisfied judgment in favor of Edith Freadrich on which no payments had been made after June, 1910, and as to which plaintiff's mother estimated that $750 remained unsatisfied, and as to which no attempts had been made to enforce it after removal of plaintiff from Lancaster county. In January, 1912, Edith Freadrich was

temporarily unemployed, owned no property, and was dependent on her daily labor to support herself and child. The relations between herself and her late husband, at least prior to the divorce proceedings and continuing to the second week in January, 1912, had not been friendly. She knew at the time of this alleged interview that he had married Luella Thorne on May 23, 1911. Her attitude towards his present widow, who is a party defendant herein, her husband's second wife, may be judged from a letter written by her and mailed at Chicago, Illinois, addressed to Charles H. Freadrich, on June 29, 1920. The following is quoted therefrom, viz.:

"You no doubt are surprised to see I am willing for Josephine to come to Lincoln and I hope you will understand what it means to me; but I want you to see I am big enough to forget everything and let her come. There is just one condition I will make, and that is that she is not to *see* or be asked to go anywhere where she will meet your wife. If your wife is home that means Josephine is not to go to your house or for your wife to come to your mother's while Josephine is there. When you write me and give me your word as to this, then I will be contented to let her go & if I feel right about it she will enjoy herself better. Write me as soon as possible so we can make our plans."

Evaluated in the manner suggested, we find the proof in this case wholly insufficient to sustain plaintiff's cause of action. Even accepting the quoted evidence at face value, it does not establish the necessary meeting of minds, nor the definiteness and certainty essential to the validity of a binding contract, and neither does it establish a sufficiency of performance to remove the bar of the statute of frauds. At the outset, it will be noted that in the first part of the conference all present contributions by Freadrich to his divorced wife for the benefit of his child are absolutely refused. He had "other obligations" that prevented, and besides, though his business had been progressing, he needed his money to put in his business and he was not in a position to help. The number of these "other obligations" then exist-

ing, and the amounts involved, are, with but one exception, not specified or defined. The evidence we are considering contains the following: "He said his father and mother were getting older all the time and that they were not in real good circumstances and that was a part of his obligations. * * * I told him he most certainly should, his mother should come ahead of every one." There is nothing in the evidence that relates to how, when, and by what method Freadrich intended to perform and satisfy any of these "other obligations," including the part he owed to his father and mother, which was then regarded by him to be superior and preeminent to the claims of his child. The affirmative statement on this subject by the sole witness testifying is that the making of a will was not mentioned or discussed during the interview. Under these circumstances, the controlling evidence contains no limitation or restriction on the deceased's discretion in dealing with the performance and fulfilment of the "other obligations," and whether they were to be discharged *inter vivos* or provided for by a last will was clearly reserved for his sole determination. But nothing in the entire record negatives the purpose and intent of plaintiff's father that ultimately these "other obligations" should each be fully carried out and discharged. So far as his obligation to his parents was concerned, that determination was exercised and that obligation performed, by his last will, executed January 14, 1933, wherein a trust fund of $20,000 was created, the income of which was made payable to his parents or the survivor of them, as long as they should live.

It also appears in this alleged conversation that Freadrich was well aware that his wife's statutory share in his estate, after his death, could not be diminished by any testamentary provision he might make. In fact, the proof we are now considering contains special reference by the now deceased to the laws of Nebraska defining and governing the rights of a wife in a decedent's estate, as well as children's rights of inheritance therein. This clearly appears in the last statement attributed to Freadrich, at the

close of the first and only conference alleged to have occurred, viz.:

"He said there could be no children with him, and she would be his only child heir and that she would come in at his death to three-fourths of his estate and his wife one-fourth."

The reference here is plainly to the then controlling sections of the Nebraska statutes, which, in view of the fact that the only property then owned by Freadrich was personal property, were sections 4903, 4901, 1522, and 1527, Cobbey's Annotated Statutes of Nebraska for 1911. These provide for and define the rights of a "child heir."

Section 4903, so far as applicable to the situation as existing in 1912, provided: "When any person shall die possessed of any personal estate or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows: First. The surviving husband or wife, if any, and if there be no surviving husband or wife, then the child or children, if any, of the deceased shall be allowed all the wearing apparel and ornaments and household furniture of the deceased, and all the property and articles that was or were exempt to the deceased at the time of his or her death, from levy or sale upon execution or attachment, and other personal property, to be selected by her, him or them, not exceeding Two Hundred (200) Dollars in value, and this allowance shall be made to such surviving husband or wife or child or children, if any, as well when he or she or they shall receive provision made in the will of the deceased as when the deceased dies intestate."

By the second subdivision, provision was made for such reasonable allowance as the county judge may deem necessary to the husband or wife and children constituting the family of the deceased, etc.

Further, "Sixth. The residue, if any, of the personal estate shall be distributed in the same proportions to the same persons as prescribed for the descent and distribution of real estate."

Section 4901, which is applicable where husband or wife survives, provides, first, that the property referred to in the sixth subdivision, above referred to, "shall descend, subject," etc., in the following manner: First, one-fourth part to the wife surviving. Fifth, (in effect) the remainder of the said property shall descend in equal shares to his children.

As applied to the instant case, these statutory provisions would limit the right of inheritance of plaintiff to three-fourths of the estate remaining undisposed of by will, if the ancestor should die testate, and after making the deductions provided for in the controlling statutes. And it may be stated in passing, "It is commonly said that the existing statutes and the settled law of the land at the time a contract is made becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention." 12 Am. Jur., 769, sec. 240. See, also, *McWilliams v. Griffin,* 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039; *Watts v. Long,* 116 Neb. 656, 218 N. W. 410, 59 A. L. R. 728.

With the terms of the Nebraska statutes considered as part of this claimed oral agreement here sought to be enforced, it is obvious that "three-fourths of my estate" which plaintiff claims under her father's oral promise she should receive upon his death must be deemed limited and diminished by the statutory rights of Luella Freadrich, and also by the terms of the statute defining rights of children to inheritance in the estate of a deceased ancestor.

For, assuming that Charles H. Freadrich had died intestate on January 15, 1912, leaving no indebtedness (eliminating all consideration as to how his "other obligations" were to be satisfied), the $2,000 in personal property then constituting his entire assets would have been disposed of substantially as follows: (1) $250, estimated cost of probate; (2) $600, allowance to the widow (estimated); (3) all articles of wearing apparel and ornaments and household furniture of deceased to descend to widow; (4) $500,

personal property exempt from execution, to descend to widow; (5) $200, other personal property to be selected by survivor; total $1,550; and thus $500 only would remain subject to the claims of the second wife and plaintiff, conceding arguendo full validity to the claimed contract. In passing it may be noted that deceased provided insurance policies on his life payable to plaintiff in the sum of twelve thousand dollars, and also a policy on his life in the sum of ten thousand dollars in which she is a contingent beneficiary.

Therefore, in the instant case, where, in the claimed oral conversation, the ancestor declared the existence of certain preeminent "other obligations" which were then in part identified and in principle agreed to, but the true extent and amounts of which were not then made known, and where, in a later part of the same conversation, without in any manner indicating a change of position or intention with reference to such "other obligations," an oral promise is made by such ancestor that his child shall receive three-fourths of his estate *as his only child heir,* such promise must be construed as a part of the entire conversation, and in connection with the Nebraska statute relating to intestate succession expressly limiting the right of inheritance to property "not disposed of by will." So construed, the subsequent execution of a will by the ancestor, certainly so far as the same may relate to the satisfaction of the "other obligations," constitutes no violation of the claimed oral promises made by him.

Even if the portion of the conversation as to the existence of "other obligations" be deemed wholly repugnant to the portion of the conversation wherein the deceased is said to have promised that plaintiff, at his death, would come in for three-fourths of his estate, so that the two clauses cannot stand, still this fact would not change the conclusion above announced. Even in the case of a completed contract in writing, the controlling rule of construction is, viz.: "Where two clauses are so repugnant that they cannot stand together, the first will be retained and the second re-

jected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn." 13 C. J. 536. See, also, 12 Am. Jur., 778, sec. 243.

It follows that, if the conversation detailed in the proof under consideration is to be given legal effect, the "other obligations" may not be ignored.

An obligation is ordinarily defined as that which a person is bound to do or forbear; any duty imposed by law, promise or contract, by the relations of society, or by courtesy, kindness, etc.

In the instant case the deceased regarded these "other obligations" as superior to the claims of his child. He, Freadrich, refused to contribute to his child's support because of these then existing obligations. Their amount, in the aggregate, was not stated, and their identity and nature, excepting the obligation in reference to his parents, was not made known.

Under these circumstances, the conversation alleged to have occurred at Galesburg, Illinois, in January, 1912, lacks the certainty and definiteness to constitute a binding present contract. It is no more than a partial contract to make a contract in the future. The rule is that, unless an agreement to make a future contract is definite and certain upon all subjects to be embraced, it is nugatory. An agreement that the parties will in the future make such contract as they may then agree upon amounts to nothing. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as a result of future negotiations. An agreement which on its face leaves some essential terms to future agreement is incapable of enforcement. *Bonicamp v. Starbuck*, 25 Okla. 483, 106 Pac. 839, L. R. A. 1917B, 141; *Irish v. Pulliam*, 32 Neb. 24, 48 N. W. 963.

Likewise, the circumstance that the parties intended a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount

to an agreement. *Sherry v. Proal,* 131 App. Div. 774, 116 N. Y. Supp. 234; *Franke v. Hewitt,* 56 App. Div. 497, 68 N. Y. Supp. 968; *Ridgway v. Wharton,* 6 H. L. Cas. (Eng.) 268; *Lyman v. Robinson,* 14 Allen (Mass.) 242; *Brown v. New York Central R. Co.,* 44 N. Y. 79; *Bryant v. Ondrak,* 87 Hun, 477, 34 N. Y. Supp. 384.

It follows, therefore, in view of the surrounding circumstances, that the conversation testified to by plaintiff's mother as having been had at the alleged conference between Charles H. Freadrich and this witness in January, 1912, would not constitute a valid contract, but, because of its indefiniteness and uncertainty as to the terms of agreement, if ever made, would be absolutely void and unenforceable.

But, in so determining the legal effect of plaintiff's evidence, we do not find, and must not be understood as determining, that any meeting between plaintiff's mother and Charles H. Freadrich ever occurred at Galesburg, Illinois, in January, 1912, or that any agreement whatever, partial or incomplete, was then entered into at that time and place.

The intrinsic weakness of plaintiff's proof is to be found in the fact that the evidence involved is occupied wholly in detailing an extended conversation had by plaintiff's mother with Charles H. Freadrich, who was deceased at the time of this trial. It comes entirely from the mouth of a witness having a great natural interest in the result of this litigation, who is wholly without contemporary corroboration. This witness swears that plaintiff, then a child of seven, was present during the entire conference and there "made up with her father." The plaintiff swears that she has no recollection whatever of the transaction, or of the fact of an agreement having been made. We know from plaintiff's own letter written August 22, 1917, that she then had no recollection of having seen her father since 1909.

The sole witness testifying to the Galesburg meeting fixes the time thereof as follows: She testifies that she knows the time of this conference; that Mr. Speilman, her

husband, who died in the latter part of 1911, had departed this life shortly prior thereto; that she was then a widow, and that she married Mr. Shogren in March of 1912. Again she swears that she is positive it occurred just before her daughter's birthday on January 19. Then, again, she testified that to the best of her recollection it occurred on January 12 or 14, 1912. On cross-examination, with reference to the time of this Galesburg meeting, she stated: "I know it was before her (the daughter's) birthday. * * * I can't pin myself down." It might have been "from four, five, six days" before her daughter's birthday. January 12 and 14, or at most, as fixed by the actual scope of this witness' testimony, January 12, 13, 14, and 15 are the crucial dates.

A "cash and credit statement book," being a written record of the business transactions of the firm of Freadrich Brothers, covering the entire year of 1912 is in evidence. It is a bound volume and not a loose-leaf record. The entries are in the handwriting of an employee of this firm, were substantially contemporaneous, and made under the supervision of Lorence R. Freadrich, in the ordinary course of the firm's business, and verified by him as being true and correct. In this record one dated page is devoted to each day's business, and the business of consecutive days of the month appear on consecutive pages. As part of the daily entries thus made is noted the presence of the partners and their clerks, together with the amount of business transacted by each. There are no entries for Sundays. This record discloses that on the four days mentioned Charles H. Freadrich was in the store in Lincoln, carrying on the business, and it is to be noted that the aggregate amount of the business transacted by him on the 12th, 13th and 15th days of January, 1912, compares favorably with the records of the others employed therein. The 14th day of January, 1912, was Sunday, and of course no records for this day appear in this statement book, but in the bill of exceptions there is a letter which was written on January 14, 1912, by Lorence R. Freadrich, inclosed in an envelope, postmarked "Lincoln, Nebraska, January 14, 1912," and sent to Chicago, Illinois. In this letter, he says in part:

"This has been a long day. I went to Church with mother this a. m., and Charles and Lulu. We (went) down to dinner and at 3:00 I went out to Frey's greenhouse."

His recollection being refreshed by this letter, the statement book and other sources of information, Lorence R. Freadrich swears positively that "Charles and Lulu" referred to his brother Charles H. Freadrich and his brother's wife Luella. He further testifies that Charles H. Freadrich was in Lincoln, Nebraska, during January 12, 13, 14, and 15, 1912, and in fact was in Lincoln during the entire month of January, 1912, and could not have been in Galesburg, Illinois, at any time during that period.

It would indeed extend this opinion to an unwarranted length to abstract or set forth verbatim all the proof substantially corroborating these statements. The corroboration is ample, convincing, and complete, and in view of the intrinsic nature of the opposing proof already discussed, we are compelled to the conclusion that the clear preponderance of all the evidence is that Charles H. Freadrich was not in Galesburg, Illinois, on January 12, 13, 14, 15, or 16, 1912, nor indeed at any other time during that month, and that the alleged conversation constituting the basis of plaintiff's claim never occurred. It is obvious, therefore, that the plaintiff in this hearing *de novo* has failed to establish the allegations of her petition by evidence clear, convincing and unequivocal. *Rau v. Rau,* 79 Neb. 694, 113 N. W. 174; *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611; *Young v. Gillen,* 108 Neb. 311, 187 N. W. 900; *Johnson v. Kern,* 117 Neb. 536, 225 N. W. 38.

It follows that in the findings and decree entered in this cause in favor of the plaintiff, the district court erred.

This judgment of the trial court is, therefore, reversed and the cause dismissed.

REVERSED AND DISMISSED.

NELL CRAIG ET AL., APPELLEES, V. HELEN BREEN SEEBECKER ET AL., APPELLANTS.
280 N. W. 913

FILED JULY 2, 1938. No. 30403.

1. **Specific Performance.** Equity will grant specific performance of a parol contract to leave property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and where it has been wholly performed by one party and its nonfulfilment would amount to a fraud on that party.
2. **Witnesses: COMPETENCY.** In such a suit for specific performance, a brother of the plaintiffs is not barred from testifying by the provisions of section 20-1202, Comp. St. 1929, and is a competent witness to testify to conversations with the deceased, where it appears that he has no direct legal interest in the result of the suit.
3. ———: ———. A witness is not disqualified from testifying merely because he is related to the parties; such relationship to the adverse party may affect his credibility but not his competency as a witness.
4. **Specific Performance.** The evidence in this case, indicated in the opinion, is *held* to be sufficient to establish the contract and to entitle the plaintiffs to a specific performance thereof.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

D. M. Kelleher and *E. F. Leary,* for appellants.

James T. English, Crofoot, Fraser, Connolly & Stryker and *Wear, Boland & Nye, contra.*

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

CARTER, J.

This is a suit brought by the plaintiffs, Nell Craig and Catherine Craig, for specific performance of an oral contract alleged to have been made with John P. Breen, deceased, whereby Breen in his lifetime promised to will all his property to plaintiffs if they would remain in Omaha until his death and provide him a home as they had done in the past. Plaintiffs claim that they fulfilled their part

of the contract, but that Breen died without making any arrangements whereby his property vested in them. The trial court granted the prayer of plaintiffs' petition and decreed them to be the owners of all the property of the deceased, John P. Breen. From this decree an appeal has been taken to this court by certain of the defendants.

The deceased, John P. Breen, was a bachelor. He practised law in the city of Omaha for more than 50 years, and at the time of his death on May 31, 1937, was 83 years of age. His estate consisted of an undivided interest in a residence property in Fort Dodge, Iowa, and personal property, principally consisting of cash on deposit in a bank, inventoried at $57,844.81. No will was ever found. The heirs at law of John P. Breen are two surviving sisters, Jane Brady and Mollie Breen, and three groups of nephews and nieces, the children of two deceased brothers and a deceased sister. The plaintiffs are the daughters of Ellen M. Craig, a deceased sister.

The record discloses that Ellen M. Craig and the plaintiffs lived in Omaha for many years prior to the death of John P. Breen. During that time Breen made his home with the Craigs. On December 10, 1928, Ellen M. Craig died, and it is alleged that, following her death, the plaintiffs contemplated removing to California where their brother, Robert Craig, resided. It is at this time that the alleged oral agreement was entered into between the plaintiffs and John P. Breen. The evidence is not disputed that the plaintiffs remained in Omaha, continued the same relationship with Breen that had existed up to the time of the death of Ellen M. Craig, and that such relationship continued until the death of Breen.

The record further discloses that one of the plaintiffs, Nell Craig, was a school-teacher and that she followed that profession during all the times herein mentioned. The other plaintiff, Catherine Craig, was employed at office work for some time, but, due to the condition of her health, gave up her position and assumed the active management of the home. The record shows that Breen contributed to

the expense of maintaining the home, at least to the extent of paying the rent and buying the fuel. The relationship between Breen and plaintiffs was at all times very friendly and cordial. He was friendly with some of the other heirs whom he visited occasionally, while others were practically strangers to him.

Much evidence was offered by the parties on the question whether the oral contract was made as alleged. The record is long, but we feel that the following is a fair summary of the evidence on that subject:

Robert Craig, a brother of plaintiffs, testified that several days after his mother, Ellen M. Craig, passed away in December, 1928, plaintiffs were contemplating breaking up their home and going to California, but they were dissuaded from so doing by their uncle, who said they had been together too long to separate and that if they would stay and keep up the home he would leave them his property. On another occasion, Craig was visiting plaintiffs when one of them was ill. At that time he testifies that Breen told him that he was not to worry "about the girls because you know when I die they will get everything I have."

John White, a painter and decorator, who saw Breen often during several years while he was working on the Douglas county courthouse, testified to a conversation with Breen, in part as follows: "I says, 'You are lucky to have a couple daughters, and girls at home to take care of you at your old age.' 'They are not my daughters, they are nieces.' 'Gee whiz, I thought they were your daughters all the time.' 'No, they are my nieces; they always kept the home for me;' and I says, 'You are sure lucky with two girls like that, never got married, and stay home and take care of you.' 'Well, I guess I am,' he says, 'They are sure giving me a good home, when I go they will always have a home, I will give them all I got, what I got is theirs.' "

Thomas Murray, a lawyer who was well acquainted with Breen, testified to the following conversation with him: "I think I asked him if he was still living with his nieces since the death of his sister in 1928, and he said, 'Indeed

I am, I am going to live with them until the end of my life.' He said, 'They are doing a lot for me; they are carrying a considerable load, but they are going to have their reward, because whatever I have when I die they are going to have.' "

Another witness, Mrs. Azelma R. Whitacre, testified that Breen told her, in speaking of his nieces: "Well, after I am gone they will have plenty." In respect to the purchase of an automobile by one of the plaintiffs, Breen also told her: "Well, they might as well have the car now, they will get it later anyhow."

Charles E. Foster, former district judge, testified to the following conversation with Breen: "Yes, on several occasions he would talk about his home, what a nice place he had, and what a nice home he had to live in, and he says, 'My nieces keep house.' He says, 'They want to leave, but I told them I would like to have them stay,' and he said, well, he says,—I says, 'What are they staying around here for?' and he says, 'Well, that is all right,' he says, 'I will take care of them; if they stay I will see that they have a good home afterwards, and when I am gone.' "

Many other witnesses were called who testified to statements made by Breen which showed the high regard he had for these plaintiffs for what they had done for him, especially in providing him a fine home. Many of the statements indicated an intent on his part to take care of them after he was gone and to see that they were amply provided for after his death. Without any intention of unduly simplifying the facts in the record, we think the foregoing is a fair statement of the evidence adduced on the question whether a contract was made.

Appellants contend that the evidence of Robert Craig was incompetent and that the trial court erred in not excluding it. The objection to it was based on the provisions of section 20-1202, Comp. St. 1929, which in part provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted

to testify to any transaction or conversation had between the deceased person and the witness." It will be noted in the instant case that Robert Craig has no direct legal interest in the result of this litigation. In fact, if plaintiffs prevail he will lose the share of the estate to which he would be entitled as an heir. His interests, instead of being adverse to the defendants, are identical with theirs.

In *Geise v. Yarter,* 112 Neb. 44, 198 N. W. 359, this court said: "The question, then, is whether or not Anthony had any legal interest in the controversy between plaintiff and Bills adverse to Bills or his representative. As stated thus it seems perfectly clear that any interest which Anthony had was in the success of Bills, and not adverse to him, because, if the plaintiff in this action were defeated, Anthony would be entitled to receive at least the sum to his credit, to wit, $5,232, and perhaps the value of the coupons deducted from the proceeds of the mortgage. In an action by Anthony against the executrix and Cline to recover these amounts, it is probable Anthony's evidence would be incompetent, but that is a different question. The same observations dispose of the objection on account of Cline, the surviving partner, being a representative within the meaning of the statute. As a witness in the case of plaintiff *versus* the representatives of Bills and Cline, Anthony had no interest adverse to such representatives."

In *Anderson v. Estate of Akins,* 99 Neb. 630, 157 N. W. 334, we said: "The plaintiff's mother testified in his behalf, and the defendant objected that she was incompetent as a witness under section 7894, Rev. St. 1913. This witness, as one of the heirs of the deceased, had a direct legal interest in the result of the litigation, but that interest was not adverse to the representatives of the deceased, and therefore did not disqualify her as a witness. *Hageman v. Estate of Powell,* 76 Neb. 514."

In *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829, we said: "The witness Mildred Watson is not a party to this litigation, has no interest in the alleged claim of the administrator, plaintiff, or in the defense of her mother, de-

fendant; nor has she a direct legal interest in the property of her mother, as far as it may or may not be affected in this action. The administrator has no interests adverse to this witness. In no event, under her testimony in this case, can this witness profit, which constitutes the main and essential test as to competency of the witness, under section 20-1202, Comp. St. 1929. See *Hageman v. Estate of Powell,* 76 Neb. 514, 107 N. W. 749; *Oft v. Ohrt,* 128 Neb. 848, 260 N. W. 571; *Lyon v. Ricker,* 141 N. Y. 225, 36 N. E. 189."

It is clear that the success of the plaintiffs in this litigation would bring no direct benefit to the witness Robert Craig. He, having no direct interest in the result of the suit that is adverse to the representatives of John P. Breen, is a competent witness to testify to conversations held with Breen that are pertinent to the determination of the issues involved.

It has long been the law in this state that a court of equity will grant specific performance of an oral contract to leave property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and where it has been fully performed by one party and its nonfulfilment would amount to a fraud on that party.

In *Rogers v. Casady,* 134 Neb. 227, 278 N. W. 267, we recently said: "Where it is sought to enforce an oral agreement of a person now deceased to convey or devise lands, the proof to establish the circumstances of such oral agreement must be clear, satisfactory and convincing."

In *Weber v. Crabill,* 123 Neb. 88, 242 N. W. 267, we said: "We have held that 'Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it.' *Kofka v. Rosicky,* 41 Neb. 328. See *Davis v. Murphy,* 105 Neb. 839. And in *Harrison v. Harrison,* 80 Neb. 103, we likewise held: 'The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the

evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part.' See, also, *McNea v. Moran*, 101 Neb. 476; *Evans v. Kelly*, 104 Neb. 712; *Denesia v. Denesia*, 116 Neb. 789. 'If such contract is definite, and is clearly proved, and substantial performance is proved by clear and unequivocal evidence, it has the same force as if written.' *Parks v. Burney*, 103 Neb. 572. Courts will compel specific performance of an oral contract to convey specified real estate in consideration of personal care to be given to the owner during the remainder of his natural life, when the terms of the contract are fair and reasonable and the evidence to establish such contract and its performance is clear, satisfactory and convincing."

In *Overlander v. Ware*, 102 Neb. 216, 166 N. W. 611, this court said: "In an action for specific performance of an oral agreement with a deceased person to convey land, *held*, that not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage." And, in affirming the decision of the trial court, the court in its opinion said: "We are of opinion that the evidence shows that, at the time Clark was married and was about to live with his wife apart from Kelly, it was agreed that if he would continue to live with Kelly he should have the 80 acres of land, the title to which was quieted in him by the trial judge."

Also, in the case of *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764, this court said: "An oral contract to adopt the daughter of a stranger and leave her property by will may be enforced by specific performance, where she has fully performed her part and established the agreement by clear

and satisfactory evidence. * * * Whether an oral contract to devise realty shall be enforced by specific performance after it has been performed by plaintiff depends upon the facts and circumstances of each case."

The question remaining is whether the evidence was sufficient to establish by clear, satisfactory and convincing evidence that the oral agreement was made and that the plaintiffs fulfilled their part of the agreement so as to entitle them to specific performance of the same.

We are convinced that there is sufficient evidence in the record to sustain the oral agreement. We have heretofore recited the evidence of a number of witnesses who testify to statements made by Breen that such an agreement had been made. Many other witnesses testify to statements tending to corroborate this evidence. It is not denied that plaintiffs remained with the deceased, kept house for themselves and Breen, and cared for him in his declining years and up to the time of his death. Witnesses testify to statements made by Breen during his last sickness to the effect that the "girls" had always taken good care of him. There can be no question that the contract was carried out by them to the satisfaction of Breen himself. All of the evidence cannot be discussed without an opinion of unreasonable length. We have, however, examined each item of proof on both sides and its relation to every part of the record. After so doing, we have come to the conclusion that the oral agreement was made as alleged in plaintiffs' petition, that it has been fully performed by the plaintiffs and violated by the deceased, John P. Breen.

The following cases sustain this holding: *Bergfield v. Bergfield,* 124 Neb. 67, 245 N. W. 12; *Harrison v. Harrison,* 80 Neb. 103, 113 N. W. 1042; *Johnson v. Riseberg,* 90 Neb. 217, 133 N. W. 183; *Damkroeger v. James,* 95 Neb. 784, 146 N. W. 936.

The trial court was not in error in entering a decree of specific performance for plaintiffs and its judgment will therefore be

AFFIRMED.

JAMES H. LANGAN ET AL., APPELLANTS, V. JAMES E. LANGAN ET AL., APPELLEES.
280 N. W. 903

FILED JULY 8, 1938. No. 30405.

1. Deeds. "The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Comp. St. 1929, sec. 76-105.
2. ———. The intention of the parties to a deed must be gathered from the whole instrument itself. Comp. St. 1929, sec. 76-109.
3. ———. "A grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument." *Clarke v. Marconnit*, 119 Neb. 581, 230 N. W. 254.
4. ———. The words "blooded heirs," as used in the deed in the case at bar, were words of limitation and not words of purchase. The limitation was void and the named grantee took an estate in fee simple.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

F. D. Williams and *Prince & Prince*, for appellants.

F. C. Radke, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

GOSS, C. J.

This action involves only the construction of a warranty deed, executed and delivered June 9, 1915, by James H. Langan and wife in favor of "James E. Langan and his blooded heirs," conveying 200 acres of land in Boone county. On 160 acres of the land the deed recites there was a mortgage of $8,500, "said James E. Langan assuming $4,500 of said mortgage." The action was commenced September 29, 1937, by the adult children of James E. Langan and wife, joined by the wives of such as were married, against the minor children of James E. Langan and wife and against E. H. Luikart, as receiver of the Farmers State Bank of Cedar Rapids, Nebraska, who had foreclosed a mortgage on said land and at judicial sale had bid it in on behalf of

himself as receiver and on behalf of John W. Kern, another defendant. Upon issues joined and upon a trial, the district court held that the deed did not vest any title in the children of James E. Langan; that the words "his blooded heirs" are words of limitation and not words of purchase; and dismissed plaintiffs' petition. Plaintiffs and the unsuccessful defendants appealed.

The deed was written by a banker who was dead at the time of the trial. It is now the contention of appellants that it was the intention of James H. Langan to convey to James E. Langan and to his children, as tenants in common, the 200 acres of land described in the deed, in the face of the fact that the evidence shows that several of those children, who are now parties here, were not born when the deed was made.

The evidence further shows that James E. Langan, the grantee, considered that he was the sole owner in fee simple of the land from the date of his father's deed in 1915 to recent years, by the following facts: (1) He paid the taxes from 1915 to 1933 and paid off the mortgage of $4,500 that the deed recited in 1915 as the part assumed by him. (2) In 1933 he filed suit against his children to quiet title in him as sole grantee. Later that suit was dismissed. (3) In October, 1933, he conveyed the land by quitclaim deed to his wife. (4) In 1935 he and his wife mortgaged the land to Luikart, receiver, as short time security for the agreed compromised amount due Luikart, receiver, on the judgment held by him against said Langan. (5) He made application for a loan from the life insurance company and offered to mortgage this 200 acres as security. (6) He and his wife made application for a loan to the Federal Land Bank and offered the 200 acres as security.

The appellees contend that the intent of the parties to the deed from James H. Langan must be gathered from the words used in the deed itself, unaided by parol or extrinsic evidence; that the term "blooded heirs" is too indefinite and uncertain to permit the identification of any other persons than said James E. Langan as grantees in

the deed; and that therefore the deed vested a fee simple title to the land in James E. Langan, so that, under the evidence, E. H. Luikart, receiver, is the proper successor in the chain of title.

"The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Comp. St. 1929, sec. 76-105.

The intention of the parties to a deed must be gathered from the whole instrument itself. Comp. St. 1929, sec. 76-109; *Aynes v. Bantz,* 114 Neb. 226, 206 N. W. 754.

It was sought by parol evidence to show what the grantor said as to his intent in the deed during the many years he lived after its delivery, to establish a different construction of its meaning than the words of the deed imported. The rule in that respect is as follows: "A grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument." *Clarke v. Marconnit,* 119 Neb. 581, 230 N. W. 254.

Having the foregoing principles in mind, and considering the meaning of the rather unusual term "blooded heirs," as inserted by the scrivener in the deed under consideration, it is quite apparent that it does not intend to designate the children of the grantee as tenants in common with the grantee named in person in the deed. If it intended so to name the children of the grantee, it would have used the term "children," because that term is known and understood by all persons and has no technical meaning to one whether a layman or a lawyer. We have to conclude that the word was just used and thrown into his composition artlessly by the scrivener. If it was intended to make grantees the children of the named grantee, it is void as attempting to convey to a grantee not in existence.

The most applicable case that has come to our attention is *Howe v. Howe,* 94 Kan. 67, 145 Pac. 873. To economize space, we quote the syllabus, which itself is long but contains the gist of the case:

"Deed—*Interpretation—Limitation to 'Blood heirs' Void —Estate in Fee Simple Created.* In the premises of a deed

the grantor was described as 'of the first part.' Five persons, who were his children, were named as 'of the second part.' The granting clause granted the land to 'the parties of the second part, their blood heirs and assigns.' The habendum was 'forever.' The covenant of seizin was with 'said parties of the second part.' The warranty was to 'said parties of the second part, their heirs and assigns.' A life estate was reserved to the grantor by a separate clause: *Held:* (1) The intention of the grantor is to be gathered from the four corners of the instrument. (2) The grantor intended to make a present grant of the land to the five persons named as parties of the second part, reserving to himself a life estate. The grantees were to have power to convey, but if no conveyance were made the land was to descend to their blood heirs only. (3) The words 'blood heirs' were words of limitation and not words of purchase. The limitation was void, and the grantees took estates in fee simple and not estates for life."

We derive this rule as applicable to the case at bar: The words "blooded heirs," as used in the deed in the case at bar, were words of limitation and not words of purchase. The limitation was void and the named grantee took an estate in fee simple.

The judgment of the district court is

AFFIRMED.

BERNICE RASMUSSEN, ADMINISTRATRIX, APPELLEE, V. JOHN BENSON, APPELLANT.
280 N. W. 890

FILED JULY 8, 1938. No. 30073.

1. **Damages.** A physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages.
2. ———. Damages for actual injury resulting from fright and shock are recoverable, although not accompanied by a contemporaneous injury.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. Opinion on motion for rehearing of case reported in 133 Neb. 449. *Affirmed.*

Edmund P. Nuss and *P. E. Boslaugh,* for appellant.

Carl T. Curtis and *King & Bracken, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is an action for damages arising from the sale of a sack of poisoned bran. Benson held a farm sale and sold a portion of a sack of poisoned bran to Rasmussen. This sack was not labeled "Poison," and Rasmussen fed the bran to his dairy cows and other live stock. As a result, five of his ten cows died and five were so poisoned as to be sick and rendered unfit for further dairy purposes. A hog and some twenty chickens also died as a result of the poison in this feed. Rasmussen lost his dairy route, and his business which he had built up during ten years, and which was his only means of livelihood for himself and his family, was destroyed. It is alleged that as a result of the great mental and nervous shock caused by the poisoning of his live stock, the subsequent loss of his dairy business, and the fear of communicating the poison to his dairy customers, he became fatally ill and died. According to the medical testimony he died of a decompensated heart caused by an excessive emotional disturbance. Rasmussen himself commenced this action, but at his death it was revived and continued by his wife as administratrix of his estate.

An opinion was formerly adopted in this case, to which reference is made for additional facts not deemed necessary of repetition. *Rasmussen v. Benson,* 133 Neb. 449, 275 N. W. 674. An oral argument was allowed on the motion for rehearing, and additional briefs were filed by the parties. After this careful consideration the court is of the opinion that, under the circumstances of the case, Ras-

mussen was entitled to recover for damages occasioned by loss of his live stock and the loss of the dairy business. This court erred, complains the appellant, in failing to distinguish between negligence with respect to his property and negligence with respect to his person. In other words, even if the recovery for damage to the property is correct, Benson insists that the law does not justify a recovery for the sickness and death of Rasmussen. The verdict was a general one for $3,500 and cannot be segregated by this court.

Is the appellant liable for the decompensated heart caused by the great mental and nervous shock resulting from his negligence, which proximately caused the sickness and death of the deceased? There is sufficient evidence to sustain the verdict of the jury that the appellant was negligent in the sale of the unlabeled, poisoned bran in such a way that it was likely to be used for feed for live stock. The bag of bran was sold from a hayrack with other small articles as a part of a farm sale, but there is dispute in the evidence as to what the auctioneer said, as agent for the appellant, with reference to the bran itself when it was offered for sale. The witnesses for the appellee testify that the auctioneer stated to Rasmussen and the others at the sale that the sack contained bran, and that it would make some cheap feed for cows. Witnesses for Benson state that they do not remember such a statement, and that the auctioneer said to the crowd: "I think it is bran," and it was sold that way. There is no dispute in the evidence as to whether or not the bran was labeled "*Poison*" in any way. Benson himself testifies that one moonlight night, about March 1, 1935, he picked up a piece of cardboard from the floor of the barn, and, not knowing what it was, carried it to the house so that he might look at it in the light. When he reached the kitchen he discovered that he was carrying the red "poison" label which had become detached from the sack of bran, and instead of replacing it on the sack he put it in a drawer of the kitchen cupboard. The tag is in evidence.

Benson was conducting this sale personally and through his agents. At his request a nephew had made arrangements for the auctioneer and clerks, and at his request, or at least with his acquiescence, his nephew and some neighbors picked up and arranged the items for the sale. The nephew and another who prepared for the sale were present when the bran was sold. Benson was not actually present at the time of the sale of the bran, but he had been present just before, and he returned to the scene of the sale shortly afterwards. There is proof that he interfered with the progress of the sale when the auctioneer was selling some corn for seed corn, and stated it was not good for seed corn, but would serve all right for feed. The evidence amply supports the allegation that he sold the bran at least through his agents. Even the appellant asserts in his brief for rehearing that it was sold in a "gunny sack" as "bran for stock."

After the sale was over Rasmussen returned to his home, and fed the bran purchased at the sale to his ten dairy cows and other live stock that night. The next morning, after he had milked and delivered the milk to his customers, the cows became very sick. As soon as he discovered this, Rasmussen telephoned all the customers and went by automobile to notify those without telephones. Later a chemist tested the bran and found that it was 1.75 arsenic, or 122.5 grains to a pound, while five grains is sufficient to kill a cow. According to this witness, time does not affect the strength of the poison. The veterinary who cared for the cows confirmed the finding of arsenic in the bran. According to the testimony, there was more than enough arsenic contained in that sack of bran to kill all the people in the adjacent town of Minden where the customers of the deceased lived. We are confirmed in the belief that in this case the appellant was negligent in the sale of poisoned bran for stock food, or in selling it unlabeled so that it might be used as such. In this case the negligence of the appellant caused the loss of Rasmussen's cows and other live stock, together with the loss of his dairy business. In

addition to the loss of personal property, Rasmussen suffered a decompensation of the heart caused by the severe mental stress and shock, which resulted in his death. Rasmussen started his dairy business in 1926 with three cows, and at that time he owed the bank about $2,000. He had developed his business until he had paid the debt to the bank, increased the number of cows to ten or twelve, and gained over fifty customers to whom he was selling from seventy-five to eighty quarts of milk a day. After the cows became sick he was naturally fearful lest the milk which he delivered to his customers from the poisoned cows would endanger the lives of many people to whom he felt a responsibility because they were customers of the dairy. The deceased was under such a strain that when the rendering plant came to get the dead animals he fainted and fell down in the yard. He took to his bed and was later in the hospital two different times. The bran was sold and fed to the cows on May 15, 1935, and Rasmussen died on February 20, 1936. He was not able to do any work from May 23, 1935, to the time of his death, although fully able to do so prior to the first date. Medical experts testified as to his health before and after the poisoning of the cows. They testify that his condition, as well as his death, was due to a decompensation of the heart caused by mental shock and emotional upset. Is the appellant liable for the full consequences of his negligent act in selling unlabeled, poisoned bran in such a way that it was likely to be fed to dairy cows whose milk was being delivered to the many customers of Rasmussen's dairy? It was only by extraordinary efforts that the deceased was able to prevent this. His cows were destroyed; his dairy business which he had built up during ten years was wiped out; he was deprived of his livelihood for himself and his family; and his was the responsibility of poisoning many people who consumed the milk from the poisoned cows. According to the evidence, his death resulted from the circumstances arising from the negligent sale of the poisoned bran. In such a situation is recovery limited to the value of the cows as personal prop-

erty? Is the appellant's liability for his negligence limited to the value of the personal property and not extended to the damage actually resulting from that negligence?

The deceased feared that he might poison some of his customers to whom he delivered the milk from the poisoned cows. It is not so important whether or not this actually happened as it is that he had some foundation for the fear, and suffered a severe emotional upset because of it. It is a common belief among people that arsenic poison may be communicated through milk. It has been stated in authoritative works that traces of arsenic have been found in cows' milk after giving the cows relatively large but not fatal doses of the poison, and that traces of arsenic have been found in mothers' milk where there has been medication. 3 Hefter, Handbuch der Experimentelle Pharnokologie, Part I, p. 482.

Another authority states that arsenic is excreted very slowly. It appears in the urine and feces within twenty-four hours, but only about one-fifth is eliminated in this way, and the rest may be excreted a month later. Fatal intoxications are said to have been found in a child, communicated to it from its mother's milk. Cushing, Pharmacology, Edmund and Gunn's Edition (1936) p. 194.

It is stated by another that a mother who has taken arsenic communicates the poison through her milk to her child. "That the milk of women who are taking arsenical preparations medicinally contains arsenic was known as early as 1838, when Thomson recognized its presence after the use of the iodid. A woman was given 0.008 gm. (0.012 grain) of arsenic daily for six days; 100 gm. of her milk were found to contain 0.001 gm. of arsenic. Two cases are recorded of the fatal poisoning of nursing infants to whose mothers arsenic had been given with homicidal intent. In one of these Silliman obtained decisive evidence of the presence of arsenic in the stomach and liver. In the other case it was only when a second attempt was made, about fifteen months later, to poison the mother, that the cadaver of the infant was exhumed and found to contain notable quantities

of arsenic. In a case of alleged homicide of an infant of two months, in whose cadaver Brouardel and Pouchet found a quantity of arsenic estimated at 0.005 gm. (0.8 grain), they expressed the opinion that the poison found might have originated from arsenical preparations taken by the nursing mother." 4 Witthaus and Becker, Medical Jurisprudence, Forensic Medicine and Toxicology (2 ed., 1911) p. 421.

These statements from the authorities are given this attention because appellant has taken the position, both in the briefs and in the oral argument, that he was not responsible for the damages resulting from his negligence in this case. The evidence in this case refutes the idea that the deceased was an unduly nervous person given to worry and that a normal person would not have reacted in like manner. The record establishes the fact in this case that there was ample cause for an emotional upset, and the medical experts testify that the condition of deceased was caused by the mental disturbance.

In order that it may not be misunderstood, in this case the deceased was confronted with a series of disturbing facts. He had worked long and hard to build up this dairy business from a very small beginning. It was entirely destroyed by the negligence of the appellant. The business was his livelihood and that of his family. He was fearful lest he had poisoned a considerable portion of the whole community in which he lived with the milk from the poisoned cows. He fed the cows some of the poisoned bran in the evening, and he milked them and delivered the milk to his customers the next morning. The cows were noticed to be sick later in the forenoon by his wife, and Rasmussen then made extraordinary efforts to prevent the poisoning of his customers. He had been accustomed to doing manual labor before this, but collapsed when the men came from the rendering plant to take away the dead live stock. He was confined to the hospital from May 25 to May 29, 1935, and again from October 5 to October 9. He was confined to his bed most of the time, although he occasionally

sat up. He was assisted up and down stairs, and was taken to the doctor's office. However, he was unable from that date until his death to do any work of any kind, and he died on February 20, 1936, or a little more than ten months from the date of the sale. The evidence in this case establishes that the death was caused solely by the negligence of the appellant.

This court has permitted recovery for the physical consequence of fright or shock in certain cases. In *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335, and in its second appearance here, 122 Neb. 749, 241 N. W. 531, recovery was allowed for physical injury resulting from fright and shock by an attack of a vicious dog which barked but did not bite, causing the woman attacked to swoon in the street. The dog was owned by one who owed the attacked woman the legal duty to pass his house in safety upon the street abutting his property.

The *Netusil* case followed and cited *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N. W. 643. In the *Hanford* case a woman was waiting in the street to board a standing street car when a following street car crashed into it, causing her to jump backward to avoid a collision. There was no impact of either car with her body, but she sprained her back in jumping backward. The rule is well established by these authorities that a physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages.

This case can be made more difficult and the opinion seem to reach the wrong conclusion by a misconception of the facts in the case. If the facts are different than presented in this case, different reasoning and a different conclusion might be necessary. This is not an allowance of a recovery for worry alone. The terror and the situation that confronted the deceased caused his illness and death. It was accompanied by this serious injury, a physical one. There is a difference of authority, and one doctrine is that there can be no recovery for fright unaccompanied by a contemporaneous physical injury. These cases follow the

rule announced in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354. The rule is also announced in *Louisville & N. Ry. Co. v. Roberts*, 207 Ky. 310, 269 S. W. 333, that no recovery can be had for physical injuries due to fright without physical impact. But there are other jurisdictions where there may be a recovery for physical injuries although the fright is unaccompanied by a contemporaneous physical injury. See *Cashin v. Northern P. R. Co.*, 96 Mont. 92, 28 Pac. (2d) 862, where damages for actual injury to nervous system resulting from fright and mental shock were allowed although not accompanied by a contemporaneous physical injury. See, also, *Chiuchiolo v. New England Wholesale Tailors*, 84 N. H. 329, 150 Atl. 540, and *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 Pac. (2d) 1037. This jurisdiction adopted that rule in *Hanford v. Omaha & C. B. Street R. Co.*, *supra*, and *Netusil v. Novak*, *supra*. These were not odd or unusual decisions, but are supported by logic and authority.

In *Watson v. Dilts*, 116 Ia. 249, 89 N. W. 1068, it was said: "Recovery may be had for nervous prostration from fright, caused by defendant's trespassing, by stealthily entering, in the night-time, plaintiff's home, this being a physical injury, and the proximate result of the wrong." In *Sundquist v. Madison Rys. Co.*, 197 Wis. 83, 221 N. W. 392, citing *Pankopf v. Hinkley*, 141 Wis. 146, 123 N. W. 625, it was held that liability may be based on physical disability resulting from extreme fright without bodily injury. John E. Hallen, Professor of Law, Ohio State University, in 19 Virginia Law Review, 271, states: "The older negligence rule which denied recovery without impact now seems to have become a minority doctrine, and courts which still adhere to that rule are quick to find some slight impact, and to permit recovery, although it seems apparent that the injuries were caused by the fright and not by the touch. It is predicted that if we require the plaintiff to be in danger of receiving a physical impact or to fear for her own safety, many courts will be equally quick to find these elements." The right to recover is placed squarely

on *Hanford v. Omaha & C. B. Street R. Co., supra,* and *Netusil v. Novak, supra.*

Complaint is made that injury was not forseeable in this case. In the *Hanford* case this court held that a tort-feasor was liable for injuries although they were not foreseeable. This rule is stated in 2 Restatement, Torts, sec. 461. This is not an unusual or unexpected result of the appellant's negligence anyhow. The tort-feasor seldom contemplates the amount of the resulting injury, and that he does not anticipate the extent of the damage does not bring the case within that rule. There is no error in the record and the judgment is not disturbed.

AFFIRMED.

CARTER, J., dissenting.

I am unable to agree with the court's opinion filed in this case or with the result arrived at by the majority. I agree that the defendant was negligent in the sale of the poisoned bran, under the circumstances detailed in the court's opinion, and that a judgment for damages to the live stock and dairy business of the deceased can be sustained. This dissent is devoted only to that part of the opinion which holds the defendant liable for the death of Rasmussen alleged to have been caused by worry and mental shock resulting from the loss of his cattle and damage to his dairy business.

The majority opinion stresses the point that a recovery of damages for negligence may be had without physical impact. I agree with this general statement of the law, but I submit that it is not the controlling factor in disposing of this case.

The first point that I desire to make is that the negligence of the defendant in this case was not the proximate cause of the death of Rasmussen; that it could not have been reasonably foreseen that Rasmussen's death would be caused by defendant's negligent act in selling a sack of poisoned bran as stock feed.

A noted writer on the subject states the rule as follows: "The courts have for centuries persisted in stating and

purporting to apply the 'natural and probable consequences' formula to determine whether consequences were sufficiently 'proximate' to conduct as to make it just to hold the defendant liable therefor. Many still insist that there can be no recovery if the harms complained of were not reasonably foreseeable and therefore probable. It would be most astonishing that such a formula should persist for so long if there were no validity whatever to it. The secret is revealed by the frequent qualification of the rule that *the exact manner in which the harm is sustained need not be foreseeable.* The explanation is that the courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if 'unforeseeability' refers to the general type of harm sustained." Harper, Treatise on Law of Torts, 14. (Italics ours.)

The rule is aptly stated in 45 C. J. 913, as follows: "In addition to the requirement that the result should be the natural and probable consequence of the negligence, it is ordinarily held, subject to limitations hereinafter stated, that the consequence should be one which, in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence. This rule is usually given in connection with a statement of the well-established rule requiring, as a condition of liability, that the injury should be the natural and probable consequence of the negligent act or omission for which a recovery is sought, and as explanatory of it, that is to say, the natural and probable consequences of a negligent act or omission are those which ought to have been foreseen, or could reasonably have been anticipated. A person is bound to anticipate the reasonable and natural consequences of his own conduct, if he was informed, or by ordinary observation would have been informed, of the facts and circumstances attending the negligence. But if injury could not reasonably have been anticipated as the probable result of an act of negligence, such act is either the remote cause or no cause of injury. There is neither a legal nor a moral obligation to guard against

that which cannot be foreseen. The test is what could be foreseen in the light of common or ordinary experience, for the rule of anticipation or foreseeableness is one of practical application, and not of philosophical or metaphysical speculation in causation."

Can it be said that a reasonable and prudent person would foresee that the sale of poisoned bran as feed for live stock would, as a natural result of his act, result in such worry and excitement to the owner of the live stock that he would become physically incapacitated and eventually die? Harm to the person of the deceased would not be anticipated by the most reasonable of men on such a state of facts. Reasonable men are presumed to foresee the usual, natural and probable results of their negligent acts, and for these they are held liable by the law. But the death of a person is not a usual, natural and probable result of the sale of poisoned bran for stock feed. And while such negligent act may have contributed to the death of the deceased, or even caused it, there is no liability.

An authoritative text states the rule as follows: "If the actor's misconduct is negligent and not intentional, the actor cannot be liable to another harmed thereby, no matter how directly, unless his conduct was negligent toward the other as involving an unreasonable risk of harm to him, or to a class of which he is a member. * * * Therefore, if a defendant's conduct, although involving a realizable and unreasonable risk of causing harm to certain classes of persons, involves no such risk of harm to any class of persons of which the plaintiff is a member, the fact that it causes harm to the plaintiff cannot make the defendant liable to him, and this is so, although the causal relation between his conduct and the harm is sufficient to make it the legal cause of the harm, had the defendant's conduct been negligent toward the plaintiff." Restatement, Torts, sec. 430, comment (*b*).

In *Bryant v. Beebe & Runyan Furniture Co.*, 78 Neb. 155, 110 N. W. 690, the court said: "In order to warrant a finding that a negligent act or omission, not amounting

to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of such act or omission, and that *it ought to have been foreseen in the light of the attending circumstances.*" (Italics ours.)

In *Levin v. Muser,* 110 Neb. 515, 194 N. W. 672, a druggist sold oil of mirbane, labeled as such, but not labeled "poison," to plaintiff's intestate, who used it as a gargle and died from the effects thereof. This court denied a recovery because the inference may not "be reasonably drawn that his death was the natural or probable consequence of the sale of the oil without being labeled as a poison" to one having knowledge of its dangerous character.

In *City of Crete v. Childs,* 11 Neb. 252, 9 N. W. 55, we quoted with approval from *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469, as follows: "Generally, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, the injury must be the natural and probable consequence of the negligence or wrongful act, one which ought to have been foreseen in the light of attending circumstances. The natural and probable consequences of a wrongful act or omission are not necessarily chargeable to the misfeasance or nonfeasance, when there is a sufficient intermediate cause operating between the wrong and the injury."

In *Johnson v. City of Omaha,* 108 Neb. 481, 188 N. W. 122, we said:

" 'A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause.' *Kitchen v. Carter,* 47 Neb. 776; *Merkouras v. Chicago, B. & Q. R. Co.,* 104 Neb. 491.

" 'An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence

is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.' *Chicago, St. P., M. & O. R. Co. v. Elliott,* 5 C. C. A. 347."

This court has consistently held, as demonstrated by the foregoing cases, that to recover for injuries resulting from negligence, it must appear that the injury was the natural and probable consequence of such act of negligence and that it ought to have been foreseen in the light of attending circumstances. The natural and probable consequences of the negligent sale of poisoned bran as stock feed, consequences which reasonably could be foreseen, are that the bran might be fed to live stock and cause them injury or death. But to say that the natural and probable consequences of a negligent sale of poisoned bran, consequences of which would reasonably be foreseen, are that the owner of live stock, to which the bran was fed, would suffer an emotional upset and mental shock that would cause his death is to me beyond all comprehension.

It is true that a recovery may be had for injuries resulting from fright or shock caused by the negligence of a person without a contemporaneous physical injury, under some circumstances. Such recovery, however, is limited to cases where the plaintiff is subjected to physical peril; there can be no recovery where the shock or fright is occasioned by worry and concern over a third person or over one's own property.

In *Waube v. Warrington,* 216 Wis. 603, 258 N. W. 497, it was held that there could be no recovery by the husband where his wife, who was frail in health, died as a result of prostration from fright, shock and excessive emotional disturbance caused by witnessing the death of her infant daughter, who was negligently killed in front of her home by defendant's automobile, the court saying: "Fundamentally, defendant's duty was to use ordinary care to avoid physical injury to those who would be put in physical peril, as

that term is commonly understood, by conduct on his part falling short of that standard. It is one thing to say that as to those who are put in peril of physical impact, impact is immaterial if physical injury is caused by shock arising from the peril. It is the foundation of cases holding to this liberal ruling, that the person affrighted or sustaining shock was actually put in peril of physical impact, and under these conditions it was considered immaterial that the physical impact did not materialize. It is quite another thing to say that those who are out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment. The answer to this question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended. It is our conclusion that they can neither justly nor expediently be extended to any recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger. Such consequences are so unusual and extraordinary, viewed after the event, that a user of the highway may be said not to subject others to an unreasonable risk of them by the careless management of his vehicle. Furthermore, the liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent tort-feasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."

Recovery for the physical consequences of fright at another's peril has generally been denied. 11 A. L. R. 1143; 40 A. L. R. 986; 76 A. L. R. 686; 98 A. L. R. 405, and cases therein cited.

In *Bucknam v. Great Northern Ry. Co.*, 76 Minn. 373,

79 N. W. 98, where defendant had used abusive language directed to plaintiff's husband, resulting in shock and physical injuries to plaintiff, the court said: "Within these rules, the language of the defendant's servant to a third person was not the proximate cause of her sickness. She apprehended no danger to herself; at least, she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action, if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury."

In *Sanderson v. Northern P. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, the court said:

"The plaintiff's case is, then, one where it is sought to recover damages for personal injuries due solely to fright and grief because an attempt was made to put her children off the car, and one where there was no tort against her, and no fear on her part of any physical injury or personal violence. * * *

"From the consideration of the decisions of this court cited, we hold that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, *unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.* As already stated, the plaintiff's case is not within the exception, and it follows that the trial court rightly directed a verdict for the defendant." (Italics ours.)

It would seem to me that, if the cases uniformly hold that one may not recover for injuries caused by shock and emotional upset resulting from fright at another's peril, certainly there could be no liability where the fright and concern were from the injury or death of live stock. Is it possible that no recovery can be had for the death of a mother resulting from prostration and shock at seeing her little daughter killed under the wheels of a negligently operated automobile, while a recovery may be had where a dairy-

man worries over the death of his cattle to such an extent that it contributes to or causes his death? The question answers itself.

The rule is the same and there can be no recovery where the injuries are caused by shock and emotional upset resulting from worry and concern over one's own property. In *Murray v. Mace,* 41 Neb. 60, 59 N. W. 387, this court, in an opinion by Post, J., said: "The question is therefore fairly presented, whether the measure of damage in an action for a simple trespass to personal property includes injury to the feelings of the complaining party. The distinction must not be overlooked between cases like this, where the act charged is simply unlawful in the sense that it is a violation of the right of property, and those cases where the unlawful act was inspired by fraud, malice, or like motives. As to those last named, the question is free from doubt. In all such cases mental suffering is a legitimate element of damage. * * * But in cases of trespass, where personal property is taken and carried away, in the absence of fraud, malice, or other aggravating circumstances, the measure of damage is compensation to the plaintiff for his loss, which is, as a rule, the value of the property with such incidental damage as is shown to be the natural and proximate result the wrong charged. * * * It is believed that no precedent can be found in the reports for the allowance of damage on account of injury to feelings in actions of this character. It is certain that we have been referred to no such case, nor have we found any during a careful examination of the question."

In *Henderson v. Weidman,* 88 Neb. 813, 130 N. W. 579, Letton, J., speaking for this court, said: "Compensation for mental suffering of the injured party is a legitimate element of damage in actions for trespass to property, where the unlawful act is inspired by fraud, malice, or like motives. But, in cases where the wrong consists in the taking or destruction of personal property without fraud, malice, or other aggravating circumstances, the measure of damage is compensation for the plaintiff's loss."

And in *Gilbert v. Rothe,* 106 Neb. 549, 184 N. W. 119, this court, in an opinion by Rose, J., held: "In the absence of fraud, malice or other aggravating circumstances, mental suffering is not an element of damages for a trespass resulting in a sheriff's temporary seizure of personal property."

In the case of *Barnett v. Collection Service Co.,* 214 Ia. 1303, 242 N. W. 25, the court said: "The rule seems to be well established that, where the act is wilful or malicious, *as distinguished from being merely negligent,* recovery may be had for mental pain, though no physical injury results. In such a case the door to recovery should be opened but narrowly and with due caution." (Italics ours.)

In *Anderson v. Sloane,* 72 Wis. 566, 40 N. W. 214, the court said: "No damages should be allowed for injury to the feelings of the plaintiff. Injury to the feelings is not a legitimate item of damage in any action for an injury to personal property, when such injury is not malicious and is not accompanied by insult." See, also, 17 C. J. 836, and 8 R. C. L. 528, sec. 82, and cases therein cited.

In the instant case, the defendant, in selling the bran as feed for live stock, was under no duty to the deceased, in so far as guarding against physical injury to him was concerned. What wrong did the defendant do to the person of Rasmussen when he sold the poisoned bran as stock feed? He did not sell the bran for human consumption and no reasonable person would anticipate its use for any such purpose. His duty was, therefore, to deliver a sack of bran that was fit for the purposes for which it was sold and for which the parties contemplated that it might be used. For negligence in this regard defendant is liable for the natural and probable consequences of his act which reasonably might have been foreseen. The majority opinion relies strongly upon *Netusil v. Novak,* 120 Neb. 751, 235 N. W. 335, and *Hanford v. Omaha & C. B. Street R. Co.,* 113 Neb. 423, 203 N. W. 643. These cases are clearly distinguishable. In the *Netusil* case a recovery was allowed for physical injury resulting from fright and shock by an

attack of a vicious dog. The dog was owned by one who owed the attacked woman a legal duty to use due care that she might pass his house in safety upon the street abutting his property, and the opinion so states. The negligent act of the owner caused the attacked woman to fear for her own safety, which places her within the rule set out in this dissent. In addition thereto, the resulting consequences were natural and probable consequences of the negligent act and such as ought ordinarily to be foreseen by a prudent person. On all three essential points the case is different from the one at bar.

In the *Hanford* case a woman was waiting in the street to board a street car when a following street car crashed into it. She jumped back to avoid a collision and injured her back and a recovery was allowed therefor. It will be noted in this case, as in the *Netusil* case, that the defendant owed a duty to the plaintiff to use due care for her safety, and the opinion so holds. The negligent act of the defendant caused the woman to fear for her own safety and caused her to jump back in fear of injury to herself. And, also, the resulting injuries were the natural and probable consequences of the negligent act and such as ought to have been foreseen by an ordinarily prudent person. On all these points this case differs from the one at bar.

Liability for the death of Rasmussen does not follow in the instant case for three reasons: First, his death was not the natural and probable result of the sale of a sack of poisoned bran for stock feed and not such a consequence that would be foreseen by an ordinarily prudent person; second, the fright and emotional upset complained of were not brought about by fear of physical peril to himself, damages for fright occasioned by concern for a third person or for his own property not being recoverable; and third, the defendant owed the deceased no legal duty as to his physical safety that was breached by his negligent act.

I have failed to find a single case that sustains the holding of the majority. The court by its opinion extends legal protection to an interest far beyond the authorities and

will result in a flood of fantastic damage suits. I submit that actionable negligence is based upon a breach of duty, and that a breach of duty with respect to one's property cannot support an action for injury to the owner, no matter how intimate the causal connection between the act done and the bodily injury sustained, unless it be accompanied by a breach of duty with respect to the person of the owner. As was said by Cardozo, C. J., in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99: "Proof of negligence in the air, so to speak, will not do." I submit that this case is a "negligence in the air" case and that the result of the majority is not sustained by reason or authority.

EBERLY, J., concurs in the foregoing dissent.

CHRIS M. DIEHM, SPECIAL ADMINISTRATOR, APPELLEE, V. FRANK X. DARGACZEWSKI ET AL., APPELLANTS.
280 N. W. 898

FILED JULY 8, 1938. No. 30382.

1. **New Trial.** "When, in consequence of a misstatement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial." *Howell and Gibson v. Sewing Machine Co.*, 12 Neb. 177, 10 N. W. 700.
2. **Negligence: LAST CLEAR CHANCE.** Under the doctrine of last clear chance, if one is incapable of averting harm to himself, he may still recover if the defendant knows of the plaintiff's situation and is thereafter negligent in failing to utilize with reasonable care his then existing ability to avoid harming the plaintiff.
3. ———: ———. Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand, Louis T. Carnazzo and *William P. Lynch*, for appellants.

Brogan, Ellick, Shoemaker & Fitzgerald and *R. B. Hamer, contra.*

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

PAINE, J.

This is an action at law against the city of Omaha, hereinafter called the city, and Frank X. Dargaczewski, a truck driver, to recover for the alleged wrongful death of plaintiff's intestate, Leonard Diehm, by being run over by a city truck. The plaintiff, Chris M. Diehm, was the father of the deceased, and brought the action as special administrator. The jury returned a verdict for $2,250 against both of the defendants. Separate motions for new trial were overruled. Each defendant gave bond and appealed from the judgment entered upon said verdict, and each has filed a brief.

The accident which resulted in the death of Leonard Diehm, a 12-year-old boy, occurred about the middle of the afternoon of August 20, 1936. It was a clear, bright day. The deceased, in company with two brothers, Santa and Tony Mandolfo, who were 15 and 12 years old, respectively, started to a public market to do errands for their respective parents. They took with them a boy's coaster wagon, equipped with rubber tires, in which there was an empty sack. Santa was pulling the wagon as they crossed the Eleventh street viaduct, which runs north and south in Omaha across the railroad tracks, about a block west of the depots of both the Union Pacific and Burlington railroads. This viaduct is 32 feet wide, with a sidewalk on each side about six feet wide, leaving a 20-foot roadway for two lines of automobile traffic in the center. The sidewalks are raised about six inches above the level of the roadway. The three boys with their wagon started north over the viaduct on the east sidewalk, Leonard on the west side of the wagon next to the roadway, and Tony behind the wagon, and at one place they broke into a dogtrot, and continued over the viaduct, when Leonard slipped, or fell, out onto the roadway just in front of a city truck being driven north by Dargaczewski across the viaduct.

Dargaczewski had seen the three boys going along the raised sidewalk on the east side of the viaduct for some 300 feet, and at no time had any one of them stepped down into the traffic lane, or given the slightest intimation that he intended to do so, nor did he see any reason for blowing his horn.

Six witnesses testified who actually saw the accident: The defendant truck driver and his helper, John A. Leahy, who was riding in the front seat with him, and two entirely disinterested witnesses, Mathew McGrath and C. E. Munson, who were driving motor vehicles in the southbound lane of traffic across the viaduct, and were immediately adjacent thereto at the time of the accident, and, in addition, there were the two brothers, Tony and Santa Mandolfo. Tony Mandolfo testified that he lives at 804 Forest avenue, which is next door to the home of the plaintiff; that he was in the 8A grade in school; that he and his brother Santa started with Leonard Diehm to the market, and had the coaster wagon, and came onto Eleventh street at Pierce street, and went north; that near an electric light post located in the sidewalk on the east side of the viaduct he saw Leonard fall, and testified at the trial that the truck was about 30 feet south of the pole; that Leonard's body was lying east and west, his head being to the east, about 1½ to 2 feet out from the edge of the sidewalk. It appears that Tony was at the scene of the accident on Sunday before the trial, with his brother Santa, his father, the plaintiff, and the plaintiff's attorney, going over the facts involved. It appears in the evidence on cross-examination that Tony had given a statement down at the police headquarters on the same day immediately after the accident, in which he described the accident as he remembered it at that time. The statement was taken down in writing and signed by him over 14 months before the trial, and the question was asked him at that time, "How far from you was the truck at the time you first saw it?" and his answer then was, "About five feet, or ten feet."

Santa Mandolfo testified at the trial that at the time of

the accident he was pulling the coaster wagon and running, and that he was facing north, the direction in which he was going, and, not hearing the two boys running behind, he stopped and looked around when he was about ten feet north of the light post, and the truck was already on top of Leonard. On cross-examination he admitted that he also had given a written statement at the police station about 45 minutes after the accident; admitted it was his signature signed to exhibit No. 2, a portion of which was received in evidence, and reads as follows: "Q. Tell just what you know about this accident. A. I was running on the east side of the viaduct on the sidewalk, pulling a coaster wagon, and Leonard Diehm, the boy that got hurt, was running along the sidewalk, right alongside the wagon, on the west side of the wagon. His foot slipped off the curbing and he rolled right into the street under front wheels of the truck. Q. Did you see the truck before it ran over the boy? A. Just as I seen the boy fall off the curb, I seen the truck and the boy was under the wheels."

The defendant truck driver testified that he had gradually overtaken the boys and had reduced his speed to about seven miles an hour, and the testimony of others indicates that suddenly, without any warning whatever, Leonard fell into the driveway, his body lying crosswise of the roadway, with his head about two feet off the sidewalk, and as he was about four feet tall his feet reached some six feet out into the northbound traffic lane. The driver of the truck had his two helpers with him, one sitting on the seat with him and one in the back part of the truck. The driver snapped on his brakes as hard as they would go, and testifies that he does not believe the truck went two feet after he put the brakes on.

Helper Leahy, sitting in the seat with the driver, testified that they had slowed down before they got near the boys, and that one of them either fell or tripped off the sidewalk, and that the truck was within three or four feet of him when he fell into the roadway, and when the truck stopped the front wheel had come to rest on the boy's stomach.

At the time of this accident there was traffic proceeding in the opposite direction on the westerly ten feet of this roadway, and two of the drivers in this other line of traffic were in a position to see exactly what happened, and appear to have been entirely impartial witnesses. Mathew McGrath testified that he was driving south on the viaduct at the time of the accident. He had seen the three boys and the truck which he was just about to pass, and one boy just flopped right out under the truck. Q. 702: "How far did he fall in front of the truck? how far was the truck from the boy when he fell out in the street? A. I should judge two or three feet." He said he knew an accident was inevitable and looked away.

C. E. Munson, who was driving a truck, was also in the southbound lane of traffic. He noticed the boys and the city truck, and testified that just as the city truck got even with the boys one of them seemed to dive off the sidewalk about four feet in front of the truck, and when the truck stopped it was on the boy; that it did not travel over four feet. Neither of these independent witnesses was personally acquainted with the driver of the truck.

With this brief statement of the facts, we will consider the errors. Only a few of the 16 errors relied upon by the city and the 12 errors relied upon by Dargaczewski for reversal will be set out. It is charged that the court erred in overruling motions for a dismissal or for a directed verdict on the ground that plaintiff's evidence failed to show any negligence on the part of either defendant; that the sole and proximate cause of the accident was the carelessness and negligence of plaintiff's decedent.

The fourth error relied upon for reversal is in giving court's instruction No. 2, which reads in part as follows: "Defendant city of Omaha, for answer to the petition of plaintiff, denies that at the time of the accident the said truck was being used in the service of defendant city." Counsel for city insist that this was a prejudicial misstatement of the city's position, for the city in the third paragraph of its answer alleges: "This answering defend-

ant expressly denies that the truck referred to in plaintiff's petition was, at the time in question, being used for the repairing and maintenance of the streets, alleys and public ways in said city, * * * or for the purpose of aiding and assisting defendant city in the discharge of its duties to maintain the streets and public ways of said city, as alleged in plaintiff's petition. In this connection, defendant city alleges that at all times complained of in the plaintiff's petition, *it was using the automobile truck in question in the exercise and performance of a governmental function* in that said truck was being used exclusively by the department of police, sanitation and public safety."

This instruction No. 2 was clearly a misstatement of the answer of the city, and we do not see that it is corrected or modified in any other instruction, but the jury are further instructed in No. 7, given by the court, as follows: "You are instructed that it is established by the evidence that the truck in question at the time of the accident complained of, was owned by the city of Omaha and was being used in the service of the city of Omaha in its *corporate capacity,* by the defendant Dargaczewski, an employee of the defendant city of Omaha."

This, in connection with instruction No. 2, told the jury in effect that, although the city denies that the truck was being used in its service at the time of the accident, yet the court tells them in No. 7, in effect, that the evidence proves it was being used by the city in its "corporate capacity," rather than in performing a governmental function.

"When, in consequence of a misstatement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial." *Howell and Gibson v. Sewing Machine Co.*, 12 Neb. 177, 10 N. W. 700.

The truck in the case at bar was kept in the metropolitan police garage. It was at all times under the control of Captain Payne, of the police department, who was in charge of traffic. Under his direction, the defendant truck driver and his two assistants had been using the truck all

day on the day of the accident in painting lanes to guide the children from the school building the nearest way to cross the streets, and they were returning the truck to the police garage to be stored. The painting of these lines on the streets, denoting the lanes for the school children and other pedestrians to use in crossing the streets, was a work done solely in the interest of public safety, and in lieu of the police direction of the traffic at such crosswalks. Such painting was not done to preserve or maintain the streets, but rather the lanes were painted to take the place of a traffic policeman. *City and County of Denver v. Forster*, 89 Colo. 246, 1 Pac. (2d) 922; *Auslander v. City of St. Louis*, 332 Mo. 145, 56 S. W. (2d) 778.

However, in the case at bar, this court does not decide the question whether the trial court was in error in instructing the jury that the truck was being used by the city in its corporate capacity. *Levin v. City of Omaha*, 102 Neb. 328, 167 N. W. 214.

In instruction No. 6 the court used this language in the first sentence: "The only acts of negligence charged against the defendants to which you will give consideration are," etc., and then gave two acts: First, that the driver failed to give any warning of the approach of the truck; second, failed to bring the truck to a stop when he knew that deceased was in a position of peril. This instruction would not have been subject to the objections made if the court had said that these two acts of negligence are alleged by the plaintiff or in plaintiff's petition, but in the form used by the court it is argued that it implied to the jury, not that these acts of negligence were charged by the plaintiff, but that the court itself was asking the jury to give consideration to these two acts of negligence.

Instruction No. 11 stated generally that greater care must be exercised for the safety of children in close proximity to the highway, and that the driver of a truck is presumed to know that children act impulsively and heedlessly, without the slightest warning of their intention. Instructions similar to this have been frequently given

where children of tender age were playing in, or crossing, the highway, intent upon some game. We are cited to *Brown v. Wade,* 145 So. (La. App.) 790, in which case a verdict of $2,500 was affirmed for the death of a little girl, aged three years and ten months, who was seen by a motorist 75 feet away running toward the road, when he was driving a Buick car at 35 to 40 miles an hour. It was held that the motorist, seeing the small child running toward the road on a rural highway, has no right to assume that a child of such tender years will exercise discretion to protect itself from the danger of rapidly-moving automobiles.

However, in the case at bar, the facts were different from cases where this instruction has been used. Leonard Diehm was 12 years of age; he had sold and carried newspapers and magazines, he had been employed to pass handbills for grocery stores and drugstores, and had done some caddying. He had experience and knowledge of the danger of crossing streets carrying automobile traffic. He had been sent on an errand to the store, and was not engaged in carefree play, but suddenly fell directly in front of the truck. It is a question whether the giving of instruction No. 11 was justified.

In *De Griselles v. Gans,* 116 Neb. 835, 219 N. W. 235, when a nine-year-old boy ran out into an alley, chasing an automobile tire, and was fatally injured by a truck, a verdict for $5,000 was reversed, in an opinion written by Judge Redick, on the ground that the evidence was insufficient to support a verdict for plaintiff.

In *Troup v. Porter,* 126 Neb. 93, 252 N. W. 611, where the decedent suddenly stepped in front of the defendant's car, it was held that the court was justified in entering judgment for defendant.

We will now consider the doctrine of last clear chance, which is argued extensively in the briefs in the case at bar. The plaintiff contends that this doctrine was applicable, while the defendants insist that it was not applicable. The evidence shows that the plaintiff's intestate, by tripping and falling immediately in front of the city truck, had

placed himself in a position of peril, from which he could not extricate himself.

The doctrine is usually presented, as in the very complete annotation in 92 A. L. R. 47, under several situations: First, when the danger is actually discovered by defendant and the other person is unable to escape; second, when the other person is physically able to escape; and, third, when the danger is not discovered by defendant, but ought to have been discovered by him.

In Restatement, Torts, 1253, sec. 479, it is stated that, if one is incapable of averting harm to himself, he may still recover if the defendant knows of the plaintiff's situation, realizes the peril involved therein, and is thereafter negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

In *Lindenstruth v. Leveque,* 138 Kan. 93, 23 Pac. (2d) 486, an eight-year-old boy jumped from a wagon and ran across the street, 14 feet in front of a motorist traveling 30 miles an hour. The defendant had only a fraction of a second to stop his car, and it was held that there was no lack of diligence on his part.

In *Webster v. Luckow,* 219 Ia. 1048, 258 N. W. 685, a ten-year-old boy was with a group of children on a country road, going home from school. The group of children divided, and a motorist approached to go between the groups of children at about 15 miles an hour, when suddenly this little boy started to cross from one side of the road to the other and was killed. The verdict returned was reversed, and a new trial ordered.

In *Donahue v. Massachusetts Northeastern Street R. Co.,* 222 Mass. 233, 110 N. E. 281, a ten-year-old boy's hat blew off and he ran to pick it up directly in front of a street car, and was struck while stooping to pick it up. No gong was sounded or whistle blown. The car was running at the rate of 20 miles an hour. It was held that there was no negligence upon the part of the defendant company, and the direction of the verdict for defendant was clearly right.

We cannot take time to discuss the many other cases cited in the briefs filed in this case. This court has held that the doctrine of last clear chance applies when, subsequent to the negligence of the plaintiff, there is negligence of the defendant which is the proximate cause of the injury (*Parsons v. Berry*, 130 Neb. 264, 264 N. W. 742), and that when a person is in a place of danger, one who knows of it must use every precaution to avoid injuring him. *Nielsen v. Yellow Cab & Baggage Co.*, 130 Neb. 457, 265 N. W. 420. Other Nebraska cases are discussed in 15 Neb. Law Bulletin, 173.

It has often been said that this doctrine does not apply where the party charged is required to act instantaneously. *O'Malley v. Eagan*, 43 Wyo. 233, 2 Pac. (2d) 1063, 77 A. L. R. 582.

The preponderance of the evidence in the case at bar indicates that this unfortunate boy accidentally fell from the sidewalk into the roadway within three to five feet of the defendant's truck, and that the defendant was not negligent, but was so attentive to his driving, and put on the brakes so vigorously, that he stopped the truck just as the front wheel had reached the lad. We cannot see, under the law and the proved facts in this case, how the doctrine of last clear chance applies. Before the doctrine of last clear chance can apply, the defendant must have had a chance to avoid the collision, for the doctrine presupposes time for action. 5 Am. Jur. 778, sec. 490.

For the prejudicial errors set out herein, the judgments entered herein are set aside and the case remanded for a new trial.

REVERSED.

IN RE ESTATE OF JOHN BLOEDORN.
OTTO F. PAEGE, ADMINISTRATOR, APPELLANT, V. FERDINAND SCHMOLDT, APPELLEE.

280 N. W. 908

FILED JULY 8, 1938. No. 30342.

Executors and Administrators. Section 30-407, Comp. St. 1929, vesting the county court with jurisdiction to call before it persons who may have embezzled or concealed property of a deceased person, or who may have in their possession written instruments belonging to a deceased person, and to examine such persons, under oath, as to such property, construed, and *held* to be a mere discovery statute and to vest the county court with no jurisdiction beyond that of discovery.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

Moodie & Burke, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an appeal from the district court for Cuming county, wherein the district court found no errors in the proceedings in the county court, dismissed the case, and held, as a matter of law, that the proceedings in the county court were inquisitory in their nature, and that the court's jurisdiction extended no further than the examination of the person cited.

The proceedings originated in the county court of Cuming county for the administration of the estate of John Bloedorn, deceased, under the provisions of section 30-407, Comp. St. 1929, which reads:

"If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person shall complain to the judge of the county court, on oath, that any person is suspected to have concealed, embezzled, carried away or disposed of any money, goods, or chattels of the deceased, or that such person has in his

possession or knowledge any deeds, conveyances, bonds, contracts or other writings, which contain evidence of or tend to disclose the right, title, interest or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said judge may cite such suspected person to appear before the court of probate, and may examine him on oath upon the matter of such complaint."

The record discloses the following: On June 22, 1932, the administrator filed a complaint in the county court of Cuming county against Ferdinand Schmoldt and Martha Schmoldt, stating that they had in their possession a certificate of deposit, issued by the First National Bank of Beemer, Nebraska, to John Bloedorn, dated April 6, 1932, which they refused to deliver upon the demand of the administrator. An examination established that before Bloedorn's death Mr. Schmoldt was in possession of the certificate of deposit described, cashed the certificate at the First National Bank of Beemer, and deposited the proceeds in that bank about a week before Bloedorn died. Bloedorn roomed at the Schmoldt home during his lifetime, and all the papers belonging to him had been delivered previously to the administrator and the administrator's attorney. Schmoldt, the witness, had no papers in his possession belonging to the deceased at the time of his examination. About a year previous to Bloedorn's death the witness had borowed $150 from him, and Bloedorn took it out in board. The witness had never borrowed any other money from the deceased. The examination was continued to July 13, 1932, when another application was filed, praying that A. J. Leuthauser, an officer of the First National Bank of Beemer, be cited to appear on that day and produce the records of the bank with reference to the accounts of Mr. and Mrs. Schmoldt from April 1, 1929, to the date of Bloedorn's death, May 13, 1932. According to these records, on May 7, 1932, Schmoldt cashed a 1,600-dollar certificate of deposit and placed the money to his credit in the bank; the certificate had been indorsed by the deceased,

and witness recognized his signature. He testified that in the three-year period from April, 1929, to May, 1932, Schmoldt had deposited 11 checks totaling $813.75, which had been issued to him by the deceased. A bill of exceptions was made from this evidence, and a transcript of the pleadings and an appeal taken to the district court.

The only question in this case, which is a question of first impression in this state, is whether or not sections 30-407 and 30-408, Comp. St. 1929, are statutes by which examination of persons may be had solely for the purpose of ascertaining whether or not they have certain assets of the deceased's estate in their possession; and whether or not the statute is purely of an inquisitory nature. By a close scrutiny of the statute, it will be readily seen that it does not provide that the county court make any order in respect to the property that may be exposed by an examination of the person cited to appear before the court. Section 30-408, Comp. St. 1929, provides that for refusal to appear and answer interrogatories the court may punish the person cited by committing him to jail. Our statute is analogous to the statute adopted in the state of Massachusetts.

In the case of *Selectmen of Boston v. Boylston,* 4 Mass. *318, the court, speaking with reference to a statute, as disclosed by section 11, ch. 32, St. 1783 of Massachusetts, which authorized the probate court to convene before them and examine upon oath any person suspected of embezzling, conveying away goods or effects of a deceased person, stated that the "authority of the court, under that provision, extends only to an examination for the purpose of discovery. No other power is given by the statute; and, in that extent, it is analogous to the power exercised by the court of chancery, in England, upon a bill for discovery." This case was decided at the March term, 1808.

In the case of *Martin v. Clapp,* 99 Mass. 470, in considering generally section 6, ch. 96, Gen. Sts., which follows: "Upon complaint made to the probate court by an executor, administrator, heir, legatee, creditor or other

person interested in the estate of a person deceased, against any one suspected of having fraudulently received, concealed, embezzled or conveyed away any money, goods, effects or other estate, real or personal, of the deceased, the court may cite such suspected person, though he is executor or administrator, to appear and be examined on oath upon the matter of the complaint. If the person so cited refuses to appear and submit to examination, or to answer such interrogatories as are lawfully propounded to him, the court may commit him to the jail, there to remain in close custody until he submits to the order of the court. The interrogatories and answers shall be in writing, signed by the party examined, and filed in the probate court." The court in the body of the opinion stated (p. 471): "No supporting and no opposing testimony is received. The discovery is not only the purpose, but the end of the proceedings under the complaint."

In the case of *Saddington's Estate v. Hewitt*, 70 Wis. 240, 35 N. W. 552, the court said in the opinion (p. 247): "We are also of the opinion that under secs. 3825, 3826, R. S., no order can properly be made in regard to the property, if any, in the hands of the appellant, and concerning which his examination may be taken under said sections. These sections are probably taken from the General Statutes of Massachusetts. The law in Massachusetts was first enacted in 1783. See sec. 11, ch. 32, p. 104, Laws of Mass. 1783, reenacted in Rev. Stats. 1836 as sec. 7, ch. 65, p. 429; again, in Gen. Stats. Mass. as sec. 6, ch. 96; and again as sec. 1, ch. 133, Pub. Stats. Mass. 1882. There has been no material alteration in the act from its first enactment. This law was enacted in Michigan. * * * The statutes of Massachusetts and Michigan are substantially like secs. 3825, 3826, R. S. In Massachusetts and Michigan, the law has always been construed as simply giving the probate court the power to examine the party charged on oath, and as giving no power to make any adversary order in such matters; the object being to aid the parties interested in the estate of a deceased person in discovering property be-

longing to said estate, and as preliminary to the bringing of some proper action for the recovery thereof, and not as furnishing a method of recovering such property from the party accused for the benefit of the estate"—citing *Selectmen of Boston v. Boylston,* and *Martin v. Clapp, supra;* and Michigan cases. Continuing the court said: "It seems very plain, on the reading of secs. 3825, 3826, that there was no intention that the proceeding should be in the nature of an action to recover the property embezzled or disposed of. Had such been the intention of the legislature, it is certain some provision would have been made authorizing the court to make some order in regard to it. The only thing provided for by the statute is the examination of the party charged, and power given to compel him to submit to such examination, and there the power granted ends."

The above statute was again before the supreme court of Wisconsin in *Estate of Schaefer,* 189 Wis. 395, 207 N. W. 690, which held the statute to be a discovery statute and conferred no jurisdiction on the county court to render judgment for the possession of property.

The opinion in *Estate of Krauss,* 212 Wis. 561, 250 N. W. 388, is the latest expression of the Wisconsin supreme court on this subject. It there held: "Sec. 312.06, Stats., authorizing a citation to discover assets of a deceased person, is a mere discovery statute and vests in the county court no jurisdiction beyond that of discovery. The court has no power to make an order concerning the disposition of the property."

The Nebraska statute has adopted, in substance, the Massachusetts statute, as herein set out; and in *Medow v. Riggert,* 132 Neb. 429, 272 N. W. 238, the first paragraph of the syllabus reads: " 'If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature.' *Goble v. Simeral,* 67 Neb. 276, 93 N. W. 235."

Each case cited by the appellant has been an adversary action in a court of competent jurisdiction, where issues were framed and tried.

Section 30-407, Comp. St. 1929, as hereinbefore set out, is construed to be a mere discovery statute and to vest the county court with no jurisdiction beyond that of discovery. The power of the county court is exhausted when the discovery is had, and the proceedings with reference to the discovery terminate at this point.

Some statement is made that the trial court held this case under advisement for a period of five years. While we see no reason for the court so doing, yet the personal representative of the deceased person, during all the period of time, had a proper remedy which he might have pursued against the Schmoldts in a court of equity.

AFFIRMED.

GRANVILLE K. TWAY, APPELLANT, V. LILLIAN A. TWAY, APPELLEE.

280 N. W. 910

FILED JULY 8, 1938. No. 30347.

1. **Divorce.** "Where defendant files a cross-petition and prays for a divorce, the court will consider all the evidence and determine therefrom which, if either, of the parties is entitled to a divorce." *Felton v. Felton*, 131 Neb. 488, 268 N. W. 341.
2. ———: ALIMONY. "In fixing the amount of alimony, the court should carefully make a detailed study of every item of property belonging to each, and find its fair value; then consider the ages of the parties, the duration of and their conduct during marriage, station in life, necessities of each, as well as their health and physical condition, and then award such alimony as the evidence warrants." *Felton v. Felton*, 131 Neb. 488, 268 N. W. 341.
3. ———. Evidence examined in the instant case, and *held* to warrant the decree and judgment of the trial court granting the defendant, cross-petitioner, a divorce. Items of property and division thereof, as made by the trial court, analyzed and found to be sustained by the evidence.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Frank C. Heinisch, for appellant.

Grenville P. North, contra.

Heard before ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

MESSMORE, J.

This is an appeal from the district court for Douglas county, the court having granted a decree of divorce to the defendant, cross-petitioner, appellee in this court, and having made a distribution of the property as between the parties, from which decree and judgment, the plaintiff appeals.

The petition of the plaintiff and the cross-petition of the defendant are sufficient in substance and form to state a cause of action in behalf of each party for a decree of divorce.

Plaintiff and defendant were married August 2, 1921. The record details the history of their married life. Only the part necessary for a determination of this case will be stated: The parties reside in Omaha, Nebraska, and have been engaged in the tire business for the past five years. The tire shop was purchased in 1932; defendant, having received the sum of $100 from her mother's estate, placed this amount in the business. Plaintiff claimed to have $150 therein; the weight of the evidence is that he had no money with which to start the business. The total amount necessary to put the shop in condition to start and transact business was $290. It was successful, and property was accumulated by the joint efforts of plaintiff and defendant. The difficulty between plaintiff and defendant started, as stated by the plaintiff, when the defendant's daughter sought to establish her home with plaintiff and defendant, and to bring her child there and live with another man. The plaintiff objected to this conduct on the part of the daughter, and he testified, in substance, that he and his

wife had much trouble over the daughter and her relations with other men. The record contains several statements as to the alleged conduct of the plaintiff with other women, which is, apparently, substantiated by competent proof, as evidenced by letters and other exhibits appearing in the record. It is unnecessary to relate the details. There is evidence of each party striking the other on occasions.

At the conclusion of this testimony, the trial court awarded defendant a decree of divorce on her cross-petition, which is amply supported by the evidence. In fact, the record discloses that it was conceded by plaintiff's counsel that sufficient facts had been adduced at the trial to warrant granting a divorce in favor of the cross-petitioner, and the case then proceeded to a determination of the value of the property.

The evidence as to the value of the property is in conflict, the plaintiff claiming that the award made defendant by the trial court represented 75 per cent. of his property. This contention is not sustained by the evidence.

The trial judge awarded the wife real estate, located at 2614 Bristol street, Omaha, a five-room modern house which rented for $18 a month, with payments of $15 a month. There was a balance of $700 due on this property, it being valued at $1,400, which would leave defendant an equity therein of $700. The property was purchased on contract for $1,000; neither party had title thereto, but the contract was in the name of the defendant. The sum of $100 had been paid on the contract and $200 upon interest. The defendant claims she received a 300-dollar, instead of a 700-dollar, equity in the property. The defendant was awarded property located at 1832 North Eighteenth street, Omaha, free from encumbrance, which rented for $20 a month and was let in apartments. This property was in defendant's name, and its value, as shown by the record, was from $1,600 to $1,800. Defendant was awarded the tire shop, the court finding plaintiff and defendant were partners in the business, and she was also awarded the equipment therein, which is shown by the record to have

been worth from $200 to $500, but, owing to the condition of the business and the equipment, it would seem that the value would not exceed $300. The defendant was awarded a 1934 Lafayette automobile, value fixed at $350, and one 1935 Dodge sedan, valued at $150. The plaintiff was awarded the property at 3806 North Seventeenth street, free from encumbrance and reasonably valued at $750. There is evidence that the plaintiff had taken from the deposit box of the parties, prior to the time of the trial, the sum of $1,600. This amount is in dispute, and there is evidence that the amount was $1,000. The value of the automobiles is doubtful; the Dodge sedan was subject to a mortgage; the value of the business in its present condition is also doubtful. The defendant made an effort to, and did, working with the plaintiff, especially for the first two years of their business career in the tire shop, make a success, and the profits of their labor is by their joint accumulation.

When analyzed as to value, the division is equitable, considering the drain made upon the business by the plaintiff, and especially under the testimony showing that plaintiff and his brother divided the profits of the business, the brother receiving one-fourth and he accepting three-fourths thereof, and where the facts were such that the court did not have a fair basis for the returns of the business. The plaintiff neglected his business, apparently for the society of different women. He is a sick man; he contracted a venereal disease which he gave to his wife. The parties had been married for 17 years. The court fixed the amount of the property in accordance with the decisions in this state.

In *Felton v. Felton,* 131 Neb. 488, 268 N. W. 341, this court held:

"In divorce action where defendant files a cross-petition and prays for a divorce, the court will consider all the evidence and determine therefrom which, if either, of the parties is entitled to a divorce.

"It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as

each case must be decided on its own facts and circumstances.

"In fixing the amount of alimony, the court should carefully make a detailed study of every item of property belonging to each, and find its fair value; then consider the ages of the parties, the duration of and their conduct during marriage, station in life, necessities of each, as well as their health and physical condition, and then award such alimony as the evidence warrants." See, also, *Metcalf v. Metcalf*, 73 Neb. 79, 102 N. W. 79; *Miller v. Miller*, 91 Neb. 500, 136 N. W. 729.

Exception is taken to the amount of attorney's fees awarded to the attorney for plaintiff, and the amount of temporary alimony in the sum of $195, court costs and other items. With reference to an attorney's fee for the plaintiff, the evidence developed that he had been cited on two occasions for failure to obey the order of the district court. The exception taken to the attorney who represented plaintiff in the actual trial of this lawsuit is not here, on proper objections, to determine what the amount of such attorney's fee should be. The record discloses that the plaintiff went to many attorneys and presumably employed them to look after his interests.

Under the record, we believe that the trial court properly granted a decree of divorce to the defendant; that the division of property was proper under the evidence and the circumstances, and that the values thereof were correctly decided by the trial judge.

The judgment of the district court is

AFFIRMED.

CITY OF MCCOOK, APPELLANT, V. MARJORIE JOHNSON: RED WILLOW COUNTY, INTERVENER, APPELLEE.

281 N. W. 69

FILED JULY 15, 1938. No. 30414.

1. **Taxation.** A city purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust

for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds.

2. ———. The trust property or trust *res* under these circumstances is the tax sale certificate with the rights evidenced thereby.

3. ———. The express trust terminates on the sale of the certificate or on completion of the foreclosure thereof and the distribution of the proceeds. The trustee may not bid in the property without paying the amount of his bid.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Butler & James and *Wendell P. Cheney,* for appellant.

Wilber S. Aten and *Charles E. McCarl, contra.*

C. C. Fraizer and *John H. Kuns, amici curiæ.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

GOSS, C. J.

The city of McCook appeals from an order sustaining objections of the county of Red Willow to a confirmation of sale under a foreclosure of a tax sale certificate, for the reason that the city had not paid and elected not to pay the $350 bid by it for the property sold at the sale.

The case was tried on stipulated facts. A case was stated. At sheriff's sale in 1936, under a decree of foreclosure of a tax sale certificate, plaintiff bid in a certain lot at $350. Plaintiff did not pay in any money except court costs. It claimed and now claims the right to bid in the property as trustee for all governmental subdivisions entitled to participate in the distribution of the delinquent taxes and special assessments in the tax sale certificate upon which decree of foreclosure was rendered and claimed the right to apply as a credit upon the bid the amount found due by the decree of foreclosure. The county had intervened because there was due it taxes amounting to $25.66 princi-

pal and interest. The court ordered plaintiff to pay the $350, bid by it, to the sheriff and on its refusal and election to stand by its record sustained the objections, ordered the sale set aside and ordered a new sale.

The trial court held that Marjorie Johnson, as administratrix of the estate of Mary Geist, the deceased owner of the lot, was not in a position to urge objections to a confirmation upon the grounds set out in her objections. The case can therefore be disposed of without further reference to that defendant. The only points that need treatment in this opinion are those raised by plaintiff, city of McCook, and by intervener, the county of Red Willow.

Both plaintiff and intervener cite and rely upon practically the same statutes and the same cases. They differ materially in the interpretation of these statutes and cases, particularly *after* the foreclosure of the tax sale certificate has reached the point where the property has been bid in by plaintiff.

Both parties agree that plaintiff held the tax sale certificate as trustee for all other governmental subdivisions interested in the taxes which it evidenced. The difference between them which gives rise to the controversy is this: Plaintiff asserts that it still continues, or would continue if the sale should be confirmed without being required to pay money to satisfy its bid, to be such trustee until it shall have disposed of the property to some private purchaser for money, while the intervener contends that, when the judicial foreclosure ends in a sale, that ends the trust relation and it is therefore the duty of plaintiff as purchaser to pay the bid in money, so that it can immediately be distributed to the governmental subdivisions entitled to their respective shares of the tax money represented by the tax sale certificate foreclosed.

Plaintiff's reliance upon specific statutes is stated in these words: "There are six key sections that are involved in the question now before the court. These six sections are what now appear as sections 77-2009, 77-2010, 77-2011, 77-2040, 77-2041, and 77-2046, Comp. St. 1929." We are ad-

monished to examine these sections for the authority for that which plaintiff sought to do.

Section 77-2009 provides that at all sales (for taxes) the county board may purchase in the name of the county and for its use and benefit any real estate offered and not sold for want of bidders. The county treasurer shall issue certificates of purchase for the real estate so sold in the name of the county. These certificates shall remain in the custody of the county treasurer, who shall at any time assign the same to any person wishing to buy for the amount expressed on the face of the certificate and interest thereon at the rate of 10 per cent. per annum from the date thereof.

Section 77-2010 provides that there may be a sale for taxes within the corporate limits of any city, village, drainage district, or irrigation district, to any such body, and the proper treasurer may assign the certificate of purchase when directed by the governing body, and that when such lands have previously been sold to the county the governing bodies may purchase the tax certificate held by the county. This section further provides that the county treasurer shall not be required to account to the state treasurer or to any person for the amount of taxes due and represented by the certificate of purchase until the certificate of purchase has been sold or redeemed or through foreclosure proceedings he shall have received the money thereon.

Section 77-2011 provides that, whenever real estate is purchased by the county board, or by the city or village treasurer, the county treasurer shall not be required to account to the state treasurer, or to any person, for the amount of taxes due until the county board or city or village authorities have sold the certificate or certificates of purchase of such real estate, or until by redemption or foreclosure proceedings he shall have received the money thereon.

Section 77-2040 provides that, whenever the county board of any county, or the proper authorities of any city or village, or any person, shall have purchased any real estate for delinquent taxes of any kind or become the owner by

assignment of any tax sale certificate or tax deed, such county, city, village or person shall be deemed to be the assignee and owner of all the liens for taxes of the state, county, city, village, school district, town and other municipal subdivisions for which said tract of land is sold and may, instead of demanding a deed therefor, as provided in this chapter, or in case a deed shall have issued by surrendering the same in court, proceed by suit in equity in the district court in which such land is situated to foreclose such lien, and cause such real estate to be sold for the satisfaction thereof, and all prior or subsequent tax liens thereon, in all respects so far as practicable in the same manner and with like effect as is provided for the foreclosure of real estate mortgages.

Section 77-2041 provides that such action shall only be brought within three years after the expiration of time for redemption from such tax sale, excepting as in this section hereinafter provided, and a tax sale certificate or tax deed shall be presumptive evidence of all facts necessary to entitle plaintiff to a decree for the amount appearing to be due thereon with interest at the rate per annum required to be paid for redemption from such tax sale. Such action for the foreclosure of such tax sale certificate may be brought in any county, city, village, school district, town, drainage district or irrigation district or any other municipal subdivision or public corporation immediately after the purchase thereof, and when brought before the time for redemption for such tax sale shall have expired the owner of the lands described in such tax sale certificate, or any person having a lien thereon or interest therein, may redeem the same at any time within two years from date of sale under such foreclosure proceedings by paying to the clerk of the district court, for the use of the purchaser at such foreclosure sale, his heirs or assigns, the amount for which said land sold at such foreclosure sale, with interest thereon at the rate of 12 per cent. per annum from the date of such purchase at such foreclosure sale to the date of redemption, and the costs of suit. If the same be redeemed, the clerk of

the district court shall certify such fact to the county treasurer, who shall make a memorandum of such redemption in the sale book at his office and the sheriff or officer conducting such sale shall at once pay the proceeds thereof to the clerk of the district court. The clerk of the district court shall immediately upon receipt thereof pay the proceeds of such foreclosure sale to the county treasurer of such county or the county in which said city, village, school district, town, drainage district or irrigation district or other municipal subdivision is situated. If such land is not redeemed on or before two years from the date of such foreclosure, the purchaser, his heirs or assigns shall be entitled to the confirmation of such foreclosure sale.

Section 77-2046 provides that, if in foreclosure suit brought under the provisions of this article any tract of land does not sell for enough to pay all taxes due thereon, with interest and costs, the proceeds of such sale shall be divided *pro rata* among the several municipal subdivisions to which such taxes are due. Upon confirmation of sale the clerk of the district court shall certify to the county treasurer the year or years for the taxes of which each tract of land was sold and the treasurer shall thereupon cancel the taxes for such years.

We search in vain through these statutes which we have abstracted to find where the legislature has provided the machinery which, appellant asserts, effects the purpose of providing that the city continues as trustee of any kind of a trust after there has been a foreclosure of the tax lien and a judicial sale of the property to plaintiff.

A city, purchasing and foreclosing a tax sale certificate on real estate, does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. Comp. St. 1929, secs. 77-2009 to 77-2011; *County of Lancaster v. Trimble,* 34 Neb. 752, 52 N. W. 711; *Logan County v. Carnahan,* 66 Neb. 685, 693, 92 N. W. 984, 95 N. W. 812; *City of Plattsmouth v. Hazzard,* 132 Neb. 284, 271 N. W. 801.

The trust property or trust *res* under these circumstances is the tax sale certificate with the right evidenced thereby.

The express trust terminates on the sale of the certificate or on completion of the foreclosure thereof and the distribution of the proceeds. The trustee may not bid in the property without paying the amount of his bid.

Ordinarily a trustee sustains such a relation to the beneficiaries of the trust that he would have no right even to make a sale of the property to himself under the trust. The statute as to tax liens and certificates seems to have provided a legislative modification of that rule. The facts in this case show that the bid of the city was adequate and fair and if the city had paid the amount bid it would have provided distribution so that all the governmental subdivisions interested would have been reimbursed for their tax liens in full. To allow the city to bid in the real estate without paying in the money would permit it to speculate on the property, to hold out from the other parties interested their share of the proceeds of judicial sale and to account to them whenever it was satisfied to dispose of the property.

The district court was right in ruling that, in the circumstances, the duty was upon the city to pay the amount of its bid. The rule contended for by the city is for the legislature and not for the courts to provide.

The judgment is

AFFIRMED.

WILLIAM LEDINGHAM, APPELLEE, V. FARMERS IRRIGATION DISTRICT, APPELLANT.
281 N. W. 20

FILED JULY 15, 1938. No. 30370.

1. Waters: DAMAGES: NOTICE. The statutory requirement for written notice to an irrigation district of a claim for damages "for negligence in delivering or failure to deliver" water to an irrigator entitled thereto does not apply to damages caused

alone by the district's intentional invasion of his vested contract right to a specific quantity of the natural flow of water in a river. Comp. St. 1929, sec. 46-171.

2. **Judgment.** The granting of a perpetual injunction to prevent an irrigation district from invading the vested contract right of an irrigator to a specific quantity of water from the natural flow of a river is not necessarily a bar to an action at law for damages caused by the wrong enjoined, where damages were not pleaded, proved or determined in the suit for the injunction.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Neighbors & Coulter and *Lester A. Danielson,* for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

ROSE, J.

This is an action by William Ledingham, plaintiff, to recover from the Farmers Irrigation District, defendant, $3,500 in damages to growing crops by its failure to deliver to him from the North Platte river, through its canal, the quantity of irrigating water to which he was entitled during July, August and September, 1934, under his appropriation and vested contract right.

In an answer to the petition defendant denied the allegations on which plaintiff's claim for damages is based and pleaded failure of plaintiff to give in writing statutory notice essential to a recovery for such alleged damages. It pleaded also that a former suit barred the present action. New matter in the answer was traversed by a reply.

Upon a trial of the issues raised by the pleadings, the jury rendered a verdict in favor of plaintiff for $355.10. From a judgment therefor defendant appealed.

The first contention of defendant is that the judgment is fatally erroneous because plaintiff did not give defendant in writing statutory notice of his claim for damages. The

statute upon which defendant relies for a defense reads thus:

"Every irrigation district within the state of Nebraska shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations: Provided, however, such districts shall not be liable as herein provided, unless the party suffering such damage by reason of such negligence or failure shall, within thirty days after such negligent acts are committed, or such districts shall fail to deliver water, serve a notice in writing on the chairman of the board of directors of such district, setting forth particularly the acts committed or the omissions of duties to be performed on the part of the district, which it is claimed constitute such negligence or omission, and that he expects to hold such district liable for whatever damages may result." Comp. St. 1929, sec. 46-171.

An elaborate argument is directed by defendant to the proposition that written notice is a condition precedent to the right of plaintiff to recover damages for failure to deliver the quantity of water demanded by him, that such notice was not given and that therefore the action should have been dismissed. On the contrary, plaintiff takes the position that written notice applies alone to damages for negligence, whereas damages recoverable by plaintiff arose exclusively from the violation of his legal appropriation for a specific quantity of available water flowing naturally in the North Platte river and from a breach of his vested contract right to have such water delivered at the headgate of the lateral channel to his irrigable lands.

"Every irrigation district within the state of Nebraska," says the statute, "shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations." This language from the text quoted needs no construction. Its plain import is that it is legislation on damages for negligence. It does not apply to damages for violation of the appropriation for water and for breach of

the contract to furnish water for irrigation. There is no reason for stretching the language beyond its terms. Written notice is limited to damages for negligence. Negligence of defendant is not involved herein. Defendant denied the right of plaintiff to the quantity of water demanded by him and deliberately contested that right to the end of former litigation on the same subject. In the prior suit defendant was chargeable with notice of plaintiff's appropriation and of his vested right and insisted on conveying available water, to which plaintiff was entitled, beyond his headgate to other irrigators having subsequent appropriations and subordinate rights.

In the former suit for an injunction to prevent invasion of plaintiff's water rights, the history of those rights and the quantity of water to which plaintiff is entitled were explained in detail and repetition of the facts and of the conclusions is unnecessary. It was adjudicated that plaintiff herein is entitled, under his appropriation and vested water-right contract, to sufficient water from the natural flow of the river to properly irrigate the lands to which the water is applied, "not exceeding one second-foot for each 70 acres of land and not exceeding a total of three acre-feet during each irrigation season." *Vonburg v. Farmers Irrigation District,* 132 Neb. 12, 270 N. W. 835. The adjudication in the former case binds defendant in the present case. Under the facts and circumstances neither law nor equity required in advance of suit written notice of plaintiff's claim herein for damages as a condition precedent to recovery thereof.

Defendant urges the further defense that the cause of action in which equitable relief was granted to plaintiff in the former suit necessarily included the damages allowed herein and precluded recovery therefor in the action at bar. It is argued that the entire controversy involving the equitable relief granted and the subsequent recovery of damages in the present action at law was determinable in the former suit in equity and that the splitting of what defendant calls a single cause of action is condemned as wholly untenable.

The pleadings and judgment in the decided case of Vonburg, Ledingham and others against Farmers Irrigation District, 132 Neb. 12, 270 N. W. 835, are copied in the present record. That action was not one for specific performance of a contract. As already pointed out, the remedy sought was a determination of the quantity of water to which plaintiff is entitled under his appropriation and a permanent injunction to prevent defendant from invading his vested contract rights to specific quantities of water for purposes of irrigation. Damages were not pleaded, presented, proved or determined in the former case. There is some diversity of judicial opinion on this subject in vast fields of litigation, but the better view seems to be that, in a situation like the present, the granting of an injunction is not necessarily a bar to an action at law for damages caused by the wrong enjoined. See *Perdue v. Ward*, 88 W. Va. 371, 106 S. E. 874, and cases cited in note in 14 A. L. R. 543; *Chapman v. General Petroleum Corporation*, 152 Or. 147, 52 Pac. (2d) 190.

Error in the proceedings and judgment of the district court has not been found.

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. ALFRED HOGANSON: P. J. EWALD ET AL., APPELLEES.

281 N. W. 27

FILED JULY 15, 1938. No. 30390.

1. **Bills and Notes.** Payee in a note payable on demand after date with interest may bring an action thereon the day after the note is executed and delivered.
2. **Limitation of Actions.** In a note payable on demand after date, payee's right to extend the time for payment and thus bind indorsers on the note does not prevent the statute of limitations from running against their obligations as indorsers.
3. ———. Ordinarily the statute of limitations begins to run when a cause of action accrues.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

F. C. Radke and *Howard L. Holtzendorff*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

ROSE, J.

This action was commenced in the county court of Dodge county December 26, 1936, on a promissory note for $390, dated May 26, 1931, payable "on demand after date," with interest, to the Winslow State Bank. It was signed by Alfred Hoganson as maker and indorsed: "Ewald & Schwab, By P. J. Ewald."

The note, unpaid, fell into the hands of E. H. Luikart, receiver of the bank, plaintiff. Defendants are the maker and the indorsers. The latter were sued as P. J. Ewald and E. A. Schwab, doing business as Ewald & Schwab. They demurred to the petition on the ground that the action as to them was barred by the statute of limitations. Hoganson, the maker, permitted judgment against him by default for the full amount of the note and interest. The demurrer of the indorsers was sustained and the action as to them dismissed. Plaintiff appealed to the district court where a demurrer by the indorsers to an amended petition was sustained on the ground that, as to them, the action was barred by the statute of limitations. Plaintiff declined to plead further and the action was dismissed as to the indorsers. From the dismissal in the district court plaintiff appealed to the supreme court.

The original note with some immaterial matter deleted is in the following form:

"$390 Winslow, Nebraska, May 26, 1931.

"On demand after date, for value received, I or we, jointly and severally, promise to pay to Winslow State Bank, of Winslow, Nebraska, or order, Three Hundred Ninety and 00/100 Dollars at Winslow State Bank, Winslow,

Nebraska, with interest at the rate of 8 per cent. per annum, payable annually, from date until due, and 10 per cent. from maturity until paid.

"The makers and indorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note, and all defenses on the ground of any renewal or extension of the time of its payment that may be given by the holder to them or either of them, and agree that if interest is not paid when same becomes due and payable, the principal debt and interest shall immediately become due and payable.

"Alfred Hoganson."

It was indorsed "Ewald & Schwab, By P. J. Ewald."

In the amended petition plaintiff pleaded another note in the same form for the same amount dated December 31, 1931, signed by the same maker, Alfred Hoganson, but not signed or indorsed by the indorsers of the former note or by either of them. In the petition it is alleged that plaintiff is the holder of both notes; that the maker paid the interest to December 31, 1931, and gave the renewal note to extend the time of payment; that plaintiff relied on the waiver in the first note and accepted the second in the belief it would not release indorsers but would keep the debt from outlawing for five years from its date, December 31, 1931; that the debt and interest are unpaid; that the indorsers are estopped to rely on the statute of limitations. In respect to the petition assailed by demurrer, plaintiff states his position as follows:

"The indorsers not only authorized the maker, but made him their agent, to contract with the payee for an extension of time or renewal and to bind them to such extension and renewal without their indorsement of the renewal. It made them parties to the entire transaction that the maker had with the bank with respect to the extension by renewal and thereby kept the original note alive."

It is argued that the statute of limitations did not begin to run from the date of the original note but only from the date of actual demand, since payment was to be made "on

demand after date" and interest was at the rate of 8 per cent. "annually, from date until due," and at 10 per cent. "from maturity until paid," and "the principal debt and interest" immediately "become due and payable" upon default in the payment of interest.

This position does not seem to be tenable. No one but payee or its successor in interest could make the demand. The barring of the action by the statute of limitations is the question presented. The waivers inserted in the first note do not authorize the payee to extend or waive the time for the barring of the statute as to indorsers. In that respect their obligation was limited to their indorsement on the first note. They did not make an attempt to stop the running of the statute against them or to authorize an extension having the same effect. Notwithstanding all the obligations of indorsers on the note, it shows on its face that plaintiff could have brought an action on it the day after it was executed and delivered—May 26, 1931. This action was brought more than five years thereafter—December 26, 1936. Indorsers themselves did nothing to delay demand or to prevent payee from bringing suit within five years from May 26, 1931. The indorsers had a right to assume demand would be made on them for performance of their obligations before they were outlawed. By their demurrer they pleaded the bar of the statute at the first opportunity without committing themselves beyond the terms of their original obligations. Diligence to prevent the bar of the statute was implied by the material interest of plaintiff.

It is well settled law here and elsewhere that the statute of limitations begins to run when a cause of action accrues. *Department of Banking v. McMullen,* 134 Neb. 338, 278 N. W. 551. See note in 44 A. L. R. 397. By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations. The only allegation in the petition relating to a demand on the indorsers is that "plaintiff has on numerous occasions demanded payment from the defendants and each of them." For anything pleaded by plaintiff in the petition, all of these "numerous

occasions" may have occurred more than five years after the cause of action against the indorsers accrued.

In view of the conclusions reached, the demurrer to the petition was properly sustained and the action dismissed.

AFFIRMED.

GEORGE W. CONDON COMPANY ET AL., APPELLANTS, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLEE.
281 N. W. 31

FILED JULY 15, 1938. No. 30278.

Evidence in the record examined, and *held* sufficient to support the judgment of the trial court.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker and *Reeder & Reeder,* for appellants.

C. N. McElfresh and *August Wagner, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an action at law. It was tried upon the second amended petition, which set forth three distinct causes of action alleged to have arisen out of a single construction contract. Issues were joined. A jury was waived and trial had to the court, resulting in a judgment in favor of plaintiffs on their first cause of action for $8,983.75; a judgment in favor of plaintiffs on the second cause of action for $3,000; a judgment in favor of defendant on the third cause of action and a dismissal of the same. Plaintiffs filed their motion for a new trial as to the judgments entered on the second and third causes of action, and from the order of the district court overruling the same have appealed. The defendant also filed its præcipe on cross-appeal, as required by the rules of this court.

Preliminary to the consideration of the merits of these appeals, a question of procedure is presented. There is in the transcript a document entitled "Findings of the Court," subscribed by the trial judge, and filed in the cause. Section 20-1127, Comp. St. 1929, provides (where a jury is waived):

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

We have construed this statute as mandatory, and have held that, upon a trial of a law action to the court without a jury, the court on request shall separately state conclusions of fact and law. *Carl v. Wentz*, 116 Neb. 880, 219 N. W. 390.

But, in the instant case, the record does not disclose that either party requested the trial court to state, in writing, its conclusions of fact found separately from its conclusions of law.

"In the absence of statute it is not the common-law function of a judge in a common-law action, trying a case without a jury, to make special findings of fact." 8 Standard Encyclopedia of Procedure, 994.

Construing the statute as creating and imposing a power that did not exist at common law, it is quite obvious that a "request" by one of the parties is made a prerequisite to its exercise. This situation has been in part recognized by this jurisdiction in the case of *Sheibley v. Dixon County*, 61 Neb. 409, 85 N. W. 399, wherein the rule is announced, viz.: "Error cannot be predicated on the failure of the court to make special findings of fact where none were asked." See, also, *State v. Mitchel Irrigation District*, 129 Neb. 586, 262 N. W. 543.

But, it appears that this court has not passed upon the effect of a "special finding of fact" made by a court with-

out previous request by either party. However, under statutory provisions quite similar, if not identical, with the one we have quoted above, courts of last resort have held that a finding so made is not to be regarded as a valid statutory finding, and may not be considered except as a general finding. *Lesan Advertising Co. v. Castleman,* 265 Mo. 345, 177 S. W. 597; *Anger v. McCorkle,* 253 S. W. (Mo. App.) 72; *Kansas City v. Boyer,* 202 S. W. (Mo.) 1086; *Kelley v. Bell,* 172 Ind. 590, 88 N. E. 58; *Jacobs v. State,* 127 Ind. 77, 26 N. E. 675; *Wallace v. Kirtley,* 98 Ind. 485; *Bake v. Smiley,* 84 Ind. 212.

In support of their third cause of action, plaintiffs state that the work upon which plaintiffs bid was described in the "Proposal" for work, as follows:

"Paragraph No.	Item No.	Schedule of estimated quantities for canvassing bids	Unit	Description	Unit price on which payment is to be made	Amount
3,18	1	1,200,000	Cu. Yd.	Earth Excavation, Canal	$ .09	$108,000."

Further, "That the work (to be) performed under said Item consisted in the main of the excavation of approximately four and one-half miles of canal leading to the Columbus Hydro-Electric Power Station located about two miles north of the city of Columbus, and the excavation of the site of said Power Station and Sub-Station, and the tail-race or discharge canal leading from the Power House site approximately 1,000 feet to the south.

"That the soil, materials, terrain and nature of the work at various points of said canal, Power Station site and tail-race varied materially in character, and required the use of different machinery and methods in the excavation of same.

"That the cost of the excavation varied more than 100 per cent. at various locations in the work.

"That the excavation as originally proposed and described in Item 1 of Schedule VIII of the 'Proposal' or 'Bid Form' prepared by the defendant and its engineers, was not di-

vided by locations or the total yardage involved, to permit a separate bid upon the amount of work at different locations requiring different methods with differing costs, and the plaintiffs in bidding upon said Item were required to determine the total amount of yardage of each class or kind of work, and submit an average bid price, in consideration of the amount of yardage of differing materials and work involved, for all of the excavation contemplated under the Item. * * *

"That the tail-race and discharge canal proposed under the drawings and specifications upon which the plaintiffs' bid or proposal for Item 1 was submitted, was provided to be approximately 773 feet in length and 155 feet in width, and the Power Station for which a site was to be excavated was approximately 48 feet by 164 feet in dimensions.

"That after the execution of the Agreement hereinbefore referred to, being section 'E' of the Contract Documents, the engineers, exercising purported authority under the Contract Documents, changed the drawings and specifications fixing the location of the Power Station to a point approximately 198 feet north from the location as provided for under the original drawings and specifications, and changed the drawings and specifications to provide for a tail-race or discharge canal 192 feet in width, and extensive additional cuts in that vicinity.

"That the changes as above described necessitated the excavation of approximately 198 feet in length of additional tail-race or discharge canal at the north end of same, and an excavation of the site of the Power Station at a point approximately 198 feet north of the point where it was originally located, and extensive additional excavations at that point.

"That the engineers directed the plaintiffs to complete the work in accordance with the changes made in the drawings and specifications, and the plaintiffs completed the work in accordance with same."

Plaintiffs allege that because of the increased quantity and adverse qualities of the soil involved the change oper-

ated to plaintiffs' damage in the sum of $29,000. Plaintiffs, however, were paid at the rate of 9 cents a cubic yard for all additional excavations by them made, which said amount was accepted by them. It is obvious that plaintiffs' rights in the premises are necessarily measured by the terms of their contract, if its provisions were drawn with the instant situation in contemplation of the parties thereto. This contract is specific in its terms and constitutes a bound volume of some 98 pages. The following excerpts therefrom are applicable to the present controversy, viz.:

"All work to be done on the project shall be subject to the following rules and regulations adopted by the Federal Emergency Administrator of Public Works (herein called the 'Administrator') to carry out the purposes and control the administration of Title II of the Act, which rules and regulations shall be incorporated verbatim in all construction contracts for work on the project:"

"Definitions:

"(a) The Contract Documents consist of Instructions to Bidders, Proposal Form, Engineering Specifications, Schedules, General Conditions, Agreement, Performance Bond, Labor Bond, Qualification Forms for Bidders, and Drawings, including all modifications thereof incorporated in the documents before their execution. These form the Contract."

"The Contract Documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the Documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work."

"Drawings:

"(a) *Contract Drawings:* Contract drawings are only general drawings developed to show the character of the work to be performed and are not necessarily accurate as to details thereof.

"(b) *Detail Drawings and Instructions:* The Engineer shall furnish, with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary

for the proper execution of the work. All such drawings and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom.

"(c) *Copies furnished:* Unless otherwise provided in the Contract Documents, the Engineer shall furnish to the Contractor, free of charge, all copies of drawings and specifications reasonably necessary for the execution of the work.

"It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way affect the work under this Contract. No verbal agreement or conversation with any officer, agent, or employee of the District, either before or after the execution of this Contract, shall affect or modify any of the terms or obligations herein contained."

"Changes in the work:

"The District, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

"In giving instructions, the Engineer shall have authority to make minor changes in the work not involving extra cost, and not inconsistent with the purposes of the work, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order by the Engineer, and no claim for an addition to the Contract Sum shall be valid unless so ordered. All extra work must be approved by the P. W. A. Engineer.

"The value of any such extra work or change shall be determined in one or more of the following ways:

"(a) By estimate and acceptance in a lump sum.

"(b) By unit prices named in the Contract or subsequently agreed upon.

"(c) By cost and percentage or by cost and a fixed fee.

"If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such cases and also under case (c) he shall keep and present in such form as the Engineer may direct, a correct amount of the net cost of labor and materials, together with vouchers. In any case, the Engineer shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Engineer's estimate."

"Claims for extra cost:

"If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this Contract, he shall give the Engineer written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made."

"Article 3. The contract sum:

"The District shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds, the unit prices and lump sums set forth in the Schedule referred to in Article 1 of this Agreement at the times and in the manner in this Agreement provided.

"Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the District or the Contractor, there shall be an equitable adjustment of the Contract to prevent such hardship."

"Earth excavation defined:

"All material moved in excavation of canals or in the construction of reservoir dikes or levees shall be classified in payment as earth excavation. * * *

"Borings not guaranteed:

"At intervals in the region of the work, borings have been made. Notes for these test borings and the samples of materials may be examined at the Engineer's office. The District, however, does not guarantee the material shown by the borings or as noted in the test boring records as a true indication of the character of the material that will be encountered. The Contractor by bidding on this work accepts the above information as correct and/or acknowledges the making of such additional borings and investigations as to satisfy himself as to the character of materials."

It is clear that no claim for extra compensation on behalf of plaintiffs was ever made until after the completion of the excavations required by the changes made in the drawings and specifications, to which their petition refers. The defendant district paid for the work on monthly estimates at the rate of 9 cents a cubic yard. The change of location of the power house and the increased dimensions of the tail-race necessitated an increase in the quantity of excavation so that the original estimate of 1,200,000 cubic yards reached a final figure of 1,671,948 cubic yards. But, all were paid for and the money received by plaintiffs on the basis of 9 cents a cubic yard. No extra compensation was asked until after the contract for this excavation in suit was finished and defendant had refused to pay the contractor for the reservoir clearance, which was entirely separate from the present claim.

Plaintiffs predicate their right of recovery upon the basis that the contract agreement between the plaintiffs and defendant, section E of the "contract documents," provides at p. 52, as follows: "Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the District or the Contractor, there shall be an equitable adjustment of the contract to pre-

vent such hardship." But this provision must be read in the light of others quoted herein. In this case, eleven distinct writings form the contract which here controls. All the provisions we have quoted form equal parts of it. This contract expressly provides that "all work to be done on the project shall be subject to the following rules and regulations," etc. The contract documents are complementary, and "what is called for by any one shall be as binding as if called for by all." These rules are express agreements of the parties, mirror their intentions in entering into this contract, and must be enforced.

The provision plaintiffs rely upon must be construed in connection with the provision as to "Changes in the work," and the provision pertaining to "Claims for extra cost." Certainly we have here presented a demand which grows out of "Changes in the work" as contemplated by the contract, and one clearly embraced within the provisions for "Claims for extra cost." In fact, the claim of plaintiffs is nothing more than an assertion that they have a claim for $29,000, which is a claim for extra cost, which amounts to a hardship under the clause they quote. So construed, the provisions of the contract as an entirety must have been conformed to and carried out by them. Obviously, where extra cost is involved, except in emergency, no extra work or change shall be made unless in pursuance of a written order by the engineer, and no claim for additions to the contract sum shall be valid unless so ordered. No such written order was ever given. In addition, it is expressly provided that no claim such as here presented shall be valid unless the contractor gives the engineer written notice thereof before the performance of the work, and no such notice in writing was ever given. In fact, none of these provisions was complied with by plaintiffs, and the terms of the contract upon which they sue, under these circumstances, forbid recovery by them. In other words, construing the contract in suit as an entirety, and giving proper effect to all the provisions contained therein, there can be no recovery on plaintiffs' third cause of action.

Plaintiffs' second cause of action is for loss of profits occasioned by the fact that defendant withdrew or eliminated item 3 of schedule VIII from the contract and prevented the plaintiffs from performing the work. Item 3 of schedule VIII appears in the contract documents as follows:

"Paragraph No.	Item No.	Schedule of estimated quantities for canvassing bids	Unit	Description	Unit price on which payment is to be made	Amount
23	3	1,200	acres	Clearing reservoir site	$5.00	$6,000."

This item 3 was accompanied by other provisions in the contract, wherein it was agreed, in substance, that the work was to be properly performed consistent with the details therein prescribed. Plaintiffs, in the judgment appealed from, were allowed the sum of $3,000 as their damages. This contract provides for the premises to be cleared, an estimate of the number of acres involved, and provides compensation at the rate of $5 an acre for the area actually cleared. Obviously, for the area where no clearing would be required, no compensation could be claimed. It appears that this construction is in harmony with the common understanding among those engaged in this employment. Erik Floor, a graduate engineer, with 24 years of experience, testifies in part, viz.: "Q. In that work are you familiar and do you know what is commonly understood by contractors and engineers when they read an estimate and plans and specifications such as is given under item three of the contract No. 6 involved in this suit which reads: 'Item No. 3, Schedule of estimated quantities for canvassing bids; unit, 1,200 acres; description, clearing reservoir; unit price on which payment is to be made $5.00; amount $6,000.00' as to whether that means the actual amount cleared or the actual acreage specified? A. It generally always means the actual acreage cleared." This conclusion appears to be in accord with decisions of the courts on this proposition, by whom it is held, under similar

circumstances, that such a contract contemplates payment only for actual acres cleared. See, *Laine v. Kennedy*, 43 N. B. 173; *Myers v. Union Electric Light & Power Co.*, 334 Mo. 622, 66 S. W. (2d) 565; *Wentzel v. Lake Lotawana Development Co.*, 226 Mo. App. 960, 48 S. W. (2d) 185; *McCarthy v. McArthur*, 69 Ark. 313, 63 S. W. 56.

Conceding that there is a conflict of evidence on this point, and a conflict of evidence as to the amount of damages occasioned by defendant's act in violating this term of the contract, still this is not a trial *de novo*, and the findings of the trial court have the force and effect of a jury's verdict where the evidence is in substantial dispute. It is plain, therefore, that if 50 per cent. of the 1,200 acres was all that required clearing, at most the plaintiffs would be able to earn but $3,000 if the contract was performed. On this basis, they were amply compensated by the allowance of $3,000 damages for loss of profits, as made by the trial court.

In view of the fact that the record discloses that no motion for a new trial was filed by the defendant, its cross-appeal entitles it to no relief.

It therefore appears that the judgment entered by the district court is, in all respects, substantially correct, and it is

AFFIRMED.

HARRY I. MILLS, APPELLEE, V. WILLIAM C. HECKENDORN ET AL., APPELLANTS.
281 N. W. 49

FILED JULY 15, 1938. No. 30346.

1. **Pleading.** The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief.
2. **Creditors' Suit.** Petition in the instant case examined, and *held*

to be a petition in equity in the nature of an ordinary creditor's bill.

3. ———. "Before one having a general claim against another can maintain a creditor's bill to enforce the same, he must have reduced it to judgment." *Moore v. Omaha Life Ass'n*, 62 Neb. 497, 87 N. W. 321.
4. ———. "Whenever, on the trial of a creditor's action, it appears that the plaintiff has a remedy at law, the equitable proceedings should be dismissed." *Brumbaugh v. Jones*, 70 Neb. 786, 98 N. W. 54.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellants.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a civil action. Harry I. Mills appears as plaintiff in the petition, and William C. Heckendorn, Royce W. Heckendorn, and wife, Viola Heckendorn, are named as defendants. The substance of the language of the petition is: "Comes now the plaintiff and for cause of action against the *defendants* alleges (Italics supplied):"

Paragraph I, twenty-five years residence by plaintiff in Fillmore county; II, that *defendants*, and each of them, are nonresidents of Nebraska, and residents of Minidoka county, Idaho; III, IV, and V allege the making of an oral contract for board, care and lodging by and between the defendant William C. Heckendorn and the plaintiff; that plaintiff furnished board, care and lodging to William C. Heckendorn, as required by the terms of such contract; that the reasonable value thereof was $2,600, of which but $9.75 had been paid; "that there is a balance due plaintiff by defendant for said board and services of two thousand five hundred ninety and 25/100 ($2,590.25) dollars."

The last three mentioned paragraphs contain no reference whatever to the defendants Royce W. Heckendorn and wife,

Viola Heckendorn, except that defendant William C. Heckendorn remained in plaintiff's home "until the fifteenth day of July, 1936, when he left with his son, the defendant, the said Royce W. Heckendorn, to make his home in Minidoka county, state of Idaho," and "that said defendants are not related to plaintiff or any member of his family."

Paragraphs VI and VII of plaintiff's petition are as follows:

"VI. That the defendant, the said William C. Heckendorn, widower, attempted to dispose of his property, the following described real estate, to wit: The South West Quarter (SW¼) of Section Four (4), township Seven (7) North, Range Two (2), West of the Sixth Principal Meridian, Fillmore county, Nebraska, by a certain warranty deed dated the 14th day of May, A. D., 1928, to his son, Royce W. Heckendorn. That said defendant, the said William C. Heckendorn, sought to deliver said deed to said real estate to the said Royce W. Heckendorn on the ninth day of July, 1936; and on said date said deed was filed for record in the office of the county clerk of Fillmore county, Nebraska, and recorded in book 34, page 330 of Deeds in said office. That, although the consideration stated in said deed was 'one dollar and love and affection and other considerations,' there was no real consideration. That the said defendant, William C. Heckendorn, conveyed said property to the said Royce W. Heckendorn with the fraudulent intent to cheat and defraud plaintiff, and to hinder and delay him in the collection of his debt.

"VII. That the said Viola Heckendorn is the wife of the said Royce W. Heckendorn. That the said William C. Heckendorn is a widower."

In connection with this petition, it is to be noted that the plaintiff, during the progress of the trial, interposed a motion to make judgment in this action a judgment against the real estate involved herein, and "against the interest of Royce W. Heckendorn in this property."

In passing, it might be said that the verdict of the jury against William C. Heckendorn only, for the sum of

$1,816.45, was returned on October 13, 1937; that on November 3, 1937, the plaintiff applied for and was by the district court granted permission to withdraw this motion, and the same was thereupon by plaintiff withdrawn. At the inception of this case an affidavit for service on nonresident defendants was filed by plaintiff, and thereafter service of summons was thereupon made on each of the defendants in the state of Idaho. An affidavit for an attachment was also filed against all defendants, on the sole ground that they were each nonresidents of the state of Nebraska, and a writ of attachment was thereupon issued and levied upon the southwest quarter of section 4, township 7, range 2, west of the 6th P. M.

The defendants William C. Heckendorn, Royce W. Heckendorn, and his wife, Viola Heckendorn, after unsuccessfully challenging the validity of this service of process, presented their written motions to strike paragraphs VI and VII of the petition, above set forth, which motions were by the trial court overruled. Thereafter general demurrers were filed to this petition of plaintiff by the defendants William C. Heckendorn and Royce W. Heckendorn, which were also by the court overruled. Thereafter separate answers were filed by defendant William C. Heckendorn and defendants Royce W. Heckendorn and his wife, Viola Heckendorn.

The challenge to the sufficiency of the petition was renewed by an objection to the taking of evidence at the commencement of plaintiff's case by defendants Royce W. Heckendorn and Viola Heckendorn, for the reason that the petition fails to state a cause of action, which objection was again renewed at the close of plaintiff's evidence by motion of these defendants to direct a verdict in their favor. Similar motions were tendered and by the court overruled at the close of all the evidence.

The jury returned a verdict in favor of the plaintiff and against the defendant William C. Heckendorn, only. Separate motions for new trial were thereupon filed by William C. Heckendorn, and by Royce W. Heckendorn and Viola

Heckendorn, which were by the district court denied. Each of the defendants separately appeals.

The petition, especially in connection with plaintiff's motion that the judgment which the jury find be sustained in that amount as an attachment against the interest of Royce W. Heckendorn in this property, with request that the court defer ruling on this motion until the verdict of the jury is returned, clearly answers the specifications of a petition in equity. Paragraphs VI and VII quoted herein, while appropriate and proper in a creditor's bill, constitute no proper element of an action at law. Considered as part of a law pleading, they are worse than mere immaterial allegations, because in their essentials they are surplusage and scandalous. Our Codes of Civil Procedure usually define the inherent qualities presented by paragraphs VI and VII of this petition as irrelevant and redundant matter. It follows that, if considered as a pleading stating a cause of action at law, the district court erred in overruling defendants' motions to strike. But, construing the pleading as an entirety, it is obvious that it must be regarded as a petition in equity.

In 1 C. J. S. 1152, sec. 54, it is stated:

"Generally, however, it may be said, that the essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is at law or in equity, unaffected by the conclusions of the pleader or by what the pleader calls it, or the prayer for relief, or the nature of the defense interposed, or new matter stated in the reply, or whether the action is statutory or otherwise."

In the instant case, the plaintiff in a law action could only have determined the amount due from William C. Heckendorn. The matter of the land transfer from the father to the son and determining the rights of the son and the son's wife was a matter wholly in equity, determinable by a creditor's suit. Where the two elements are combined by the pleader as here presented, it becomes clearly an equitable proceeding, in form a representative creditor's suit.

The case of *Fairbanks, Morse & Co. v. Welshans & Co.*, 55 Neb. 362, 75 N. W. 865, while differing as to facts, in principle approximates our present situation. Without detailing the facts in that case which would unduly extend this opinion, it may be said that Welshans & Company were indebted to Fairbanks, Morse & Company. The debtors made disposition of their copartnership property, which Fairbanks, Morse & Company challenged as fraudulent. Without first securing a judgment at law, they filed a petition against all concerned seeking to reach the property transferred. In that case, this court held: "The petition set out in the opinion, and *held* to be an ordinary creditor's bill and as such not to state a cause of action."

We are quite committed to the rule, viz.: "Before one having a general claim against another can maintain a creditor's bill to enforce the same, he must have reduced it to judgment." *Moore v. Omaha Life Ass'n*, 62 Neb. 497, 87 N. W. 321. See, also, *Ainsworth v. Roubal*, 74 Neb. 723, 105 N. W. 248. The facts of the instant case bring it squarely within the rule just quoted from the *Moore* case.

The controlling question was properly raised when the demurrers of defendants were filed. It was renewed when objections to the introduction of evidence were made. It was again presented by motions for the direction of verdict in favor of defendants. It was an error that appears not only in the pleading, but which the evidence confirms, that plaintiff's proceeding was a proceeding in equity, and that he had not, prior to its institution, had his claim reduced to judgment and had an execution issued and returned thereon. This was a prerequisite to the exercise of equitable jurisdiction in this case. We are also committed to the rule, viz.: "Whenever, on the trial of a creditor's action, it appears that the plaintiff has a remedy at law, the equitable proceedings should be dismissed." *Brumbaugh v. Jones*, 70 Neb. 786, 98 N. W. 54.

Even if this be considered as an action at law, the allegations in the petition as to the fraudulent nature of the transfer of land from the father to the son, the statements

of these as a part of the issues in the instructions of the court, the evidence admitted over objection in connection with the same, and the action of the trial court in overruling the motions of defendants to strike paragraphs VI and VII from the petition, were clearly erroneous and could not, under the circumstances of this case, fail to be prejudicial to such a degree as to require a reversal of the judgment.

It follows that, for the several errors enumerated, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

IRIL C. LAMB ET AL., APPELLEES, V. ARCHIE W. SANDALL ET AL., APPELLANTS.
281 N. W. 37

FILED JULY 15, 1938. No. 30363.

1. Appeal. "Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case *de novo*, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Rogers v. Casady*, 134 Neb. 227, 278 N. W. 267.
2. Trusts: PRINCIPAL AND AGENT. "Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf." *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058.
3. ———. Evidence in the record examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Rock county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

G. A. Forman, Jr., for appellants.

S. C. Ely, William M. Ely, Franklin L. Pierce and *Philip M. Wellman, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

EBERLY, J.

This is an action in equity to establish and enforce a constructive trust against defendant Archie W. Sandall, as trustee of a trust *ex maleficio* for the benefit of plaintiffs. It is based upon an alleged violation by Sandall of an alleged oral contract of agency made by and between the plaintiffs and the defendant Sandall. The other defendants derived their rights involved in the litigation by and through the defendant Sandall. The defendants Archie W. Sandall and wife, Ruth E., each filed a general demurrer to plaintiffs' petition. The general demurrers were overruled. Thereupon these defendants answered, and to their several answers plaintiffs replied.

In the district court the plaintiffs prevailed, a decree was entered in effect adjudging them to be the equitable owners of the premises in suit, and awarding further relief as prayed in their petition. From the order of the district court overruling their motions for new trial, defendants appeal.

The record discloses that the plaintiffs and defendants were neighoring ranchers. Between their respective ranches were situated about a thousand acres of land known as the Crogan ranch. It lies about half way between the ranches of plaintiffs and defendants, and adjoins both ranches. A portion of the Crogan ranch had been rented, occupied, and used by the Lambs and by the Sandalls for ten or twelve years continuously, and these parties were each desirous of purchasing at least a part thereof. This fact was mutually known to each of them.

The contention of plaintiffs as to the controversy in suit which arose with reference to this land may be summarized as follows: Plaintiffs' petition alleges that Archie W. Sandall "proposed to the plaintiffs that if they would

agree to a division of said land (referring to the entire 1,000-acre tract which was then in possession of plaintiffs) between the plaintiffs and said defendant, and said plaintiffs would buy said west half of section six (6) and said northeast quarter of section seven (7) (being the 500 acres adjoining the plaintiffs' land), and would permit said defendant to buy said west half of the west half of section seven (7), and said east half of section twelve (12) (being the 500 acres adjoining the Sandall ranch), and that if said plaintiffs would agree not to make an offer for the purchase of said 1,000-acre tract of land in excess of $2,500, he, said Archie W. Sandall, would negotiate with the owner for the purchase of said tract at a total price of $2,500, and that he would purchase the said west half of section six (6) and said northeast quarter of section seven (7) for and on behalf of the plaintiffs, and the remainder of said tract for and on behalf of himself, the plaintiffs to pay one-half of said total price of $2,500, and one-half of any expenses incurred in making said purchase, said payment to be made at the time of the passing of the title from the owner to said plaintiffs for that part of said land which they were to buy, * * * and said defendant further proposed that he be permitted to take immediate possession of that part of said land which he would buy for himself and that the plaintiffs retain possession of that part that he was to purchase for them."

It is further alleged in this petition that these plaintiffs, believing that Sandall "would faithfully fulfil and perform his promise and agreement to purchase said land for and on behalf of the plaintiffs," accepted said offer and proposal of defendant, and agreed to all the terms and conditions thereof; that, after the making of this contract and agreement, the defendant purchased the Crogan ranch, paid for it himself, caused the title thereof to be vested in himself and his wife, Ruth E. Sandall, and repudiated and wholly failed to perform the contract of agency hereinbefore set out.

It is insisted that the evidence is insufficient to sustain

a contract of agency between the plaintiffs and Sandall. To set out the evidence on this point would unduly extend this opinion, and after setting it out the most that could be urged by defendants would be that it is conflicting. All the witnesses were personally before the trial court, and that gave to that court advantages in weighing their testimony which we do not possess, and even without allowing for that advantage we should hesitate, in view of the entire record, to hold that the evidence is not sufficient to sustain the findings and decree of the district court.

It would seem that the rule reiterated in *Rogers v. Casady,* 134 Neb. 227, 278 N. W. 267, would, under the circumstances of this record, be applicable, viz.:

"Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case *de novo,* consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite."

It would appear, therefore, that the contention of the appellees as to the facts involved is amply supported by the proof.

On this factual basis, the contention of appellants that the oral contract in suit is void under our statute of frauds still remains for our consideration. In *Stephenson v. Golden,* 279 Mich. 710, 734, 276 N. W. 849, 857, the following definitions of agency are quoted with approval, viz.:

"'An agent is a person having an express or implied authority to represent or act on behalf of another person, who is called his principal.' Bowstead on Agency (4th ed.) p. 1.

"'An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do.' 2 C. J. S. p. 1025."

See, also, 1 Mechem, Agency (2d ed.) p. 21.

It appearing that Sandall, by an oral contract, was employed as agent for the purpose of negotiating and purchasing the three north quarter-sections of the Crogan ranch, under the terms heretofore set forth, for the plaintiffs, appellants contend that this contract is void under our statute of frauds. They cite sections 36-103 and 36-105, Comp. St. 1929, to sustain their contention, and also certain adjudications from other states as sustaining their position.

An able review of the authorities on this question may be found in *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (affirmed in 86 N. J. Eq. 250, 98 Atl. 1085), in which it was held that an agent verbally employed to negotiate the purchase of land, who, in violation of such duty, purchased it with his own money, and took the deed thereof to himself, was a constructive trustee. The New Jersey court, in its opinion, says in part, viz.:

"With the view of the evidence which I entertain, the case resolves itself into a well-defined question of law about which there has been a remarkable diversity of opinion expressed in decisions of the courts and in the text-books.

"Mr. Perry seems to accept as established law that 'parol proof cannot be received to establish a resulting trust in lands purchased by an agent, and paid for by his own funds, no money of the principal being used for the payment.' 1 Perry, Trusts, sec. 135.

"Mr. Browne, in his authoritative work on the statute of frauds, appears to favor the contrary view. Browne, Fraud, sec. 96.

"In volume 15 of the Am. & Eng. Encycl. L. (2d ed.) (at p. 1187), cases on both sides of this question are cited, and it is stated that 'it seems to be held by the weight of authority that a court of equity cannot grant relief' by holding the agent 'a constructive trustee.'

"We have the supreme court of the United States and the English courts, and the courts of several of the states, firmly supporting the rule that the derelict agent can be

decreed in equity to hold in trust for his betrayed and defrauded principal. Other courts of various states of high authority have held otherwise.

"It is important to note that the whole basis of objection to the granting of relief to the deceived principal rests upon the statute of frauds. The argument, as stated by Mr. Perry, is that 'the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement, it is within the statute of frauds and must be in writing.'

"I think that this view is entirely erroneous and the trend of the decisions is toward its rejection. A trust which is more correctly classifiable as a constructive trust (1 Pom. Eq. sec. 155; 1 Perry, Trusts, sec. 166) than as a resulting trust (1 Perry, Trusts, sec. 135) is established by proof of the betrayal of confidence, of the violation of duties arising out of a fiduciary relation. The fiduciary relation may be established in a large number of ways. It is a mere accident that in this particular case, and in large numbers of others, the fiduciary relation grows out of a verbal promise. As the authorities abundantly show, equity will not tolerate the betrayal of confidence and it makes no difference how this confidence has been obtained.

"When one man assumes to act as agent for another, as the representative of another, he necessarily establishes a fiduciary relation between himself and the other person who stands as his principal. This is in the very nature of the transaction because the agent undertakes to act not for his own benefit but for the benefit of his principal, and his principal stays out of his own business and confides in the agent to attend to this business for him. It is the assumption by the agent of his representative status and the confidence necessarily reposed in him by the principal which create the agent's peculiar liabilities and cast special limitations and obligations upon him. The agency may be established by a written contract or a verbal contract, or

no contract whatever, the assumption and confidence involving a purely gratuitous service for which the agent is to receive no compensation in any form."

Appellants contend that, in the instant case, the oral contract providing for the purchase of the land being silent as to whether the land purchased for the Lambs should be deeded to them direct or that it should be deeded first to Sandall and by him to the Lambs, for this reason such contract is void under the statute of frauds. Notwithstanding this situation, in legal effect the oral contract required the title to be conveyed direct to the Lambs. The controlling principle is, viz.:

"Unless otherwise agreed, an agent receiving or holding things on behalf of the principal is subject to a duty to the principal not to receive or deal with them so that they will appear to be his own, and not so to mingle them with his own things as to destroy their identity." Restatement, Agency, sec. 398.

In the absence of a contrary agreement, the accepted principles of the law of agency would require that Sandall should not take title to the premises in his own name, but that the premises should be conveyed to the principal direct.

In this jurisdiction we stand with the states which are in harmony with the New Jersey courts, and we have announced the following as controlling in this state, viz.:

"Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf." *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058.

See, also, *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085; *Rice v. Dougherty*, 148 Ill. App. 368; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58; *Carr v. Craig*, 138 Ia. 526, 116 N. W. 720; *Matney v. Yates*, 121 Va. 506, 93 S. E. 694; *Schmidt v. Beiseker*, 14 N. Dak. 587, 105 N. W. 1102; *Brookings Land & Trust Co. v. Bertness*, 17 S. Dak. 293, 96 N. W. 97; *Morris*

v. Reigel, 19 S. Dak. 26, 101 N. W. 1086; *Rose v. Hayden,* 35 Kan. 106, 10 Pac. 554; *Sanford v. Hamner,* 115 Ala. 406, 22 So. 117; *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 54 A. L. R. 1173; *Stephenson v. Golden,* 279 Mich. 710, 276 N. W. 849.

In view of the controlling principles herein discussed, the defendants, Sandall and his wife, under the facts disclosed by the evidence, are to be properly considered, in equity, as holding the three north quarter-sections of land in trust for the Lambs, as determined by the decree of the trial court.

It follows that the judgment of the district court is in all respects correct, and it is

AFFIRMED.

CHARLES DENISON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.
280 N. W. 905

FILED JULY 15, 1938. No. 30326.

1. **Evidence.** The use of moving pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial court.
2. **Trial.** Permitting jury to examine mechanism, controlling operation of a street car door alleged to have caused injury, is held proper under instructions given.
3. **Damages.** A verdict, although somewhat excessive, does not warrant a reversal on the ground of prejudice and passion, but should be reduced $1,000 by filing a remittitur.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed on condition.*

Kennedy, Holland, De Lacy & Svoboda, for appellant.

Wear, Boland & Nye and *Robert E. McCormack, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is an action for personal injuries sustained by plaintiff in alighting from a street car in Omaha. The jury returned a verdict for $5,000, from which defendant appeals.

The plaintiff alleged in his petition that he was 57 years of age, a strong, able-bodied man, working regularly as a stock buyer, earning several hundred dollars a month, at the South Omaha stockyards; that on August 1, 1936, he was a fare-paying passenger on street car No. 907; that, while alighting at his destination, about 7:30 p. m., at Twenty-fourth and N streets, South Omaha, the rear door closed on him, hurling him to the pavement, inflicting severe, painful, and permanent injuries upon him, which are described in detail in the petition; that he lost his income for a long time, and his earning capacity was greatly diminished. He has been under the care of doctors, and indebted for medical expenses, and alleged that he had been damaged in the sum of $10,000.

The defendant admitted that it is a corporation, operating a street car line, and denied all other allegations, and asked to have the cause of action dismissed.

In the motion for new trial, the giving of nine instructions by the court, and the refusal to give fifteen instructions offered by defendant, are set out as errors, also certain errors in the trial, and misconduct of the jury. In the brief, stress is placed upon the fact that the verdict of the jury was excessive and the result of passion and prejudice.

The evidence of the plaintiff is to the effect that three passengers ahead of him got off the car at Twenty-fourth and N streets, which was a regular stopping point; that he was the last one getting off there; that he had one foot on the ground, and was removing his foot from the step when the door slammed and hit him on the left shoulder and back. His shirt was torn and his right elbow was injured; he felt pain in his neck, back, and spine. His wound was dressed by Dr. Humpal at the police station. Dr. John Koutsky was his family physician, and X-rays were taken, and hot packs and infra-red lights were used. After six

weeks he tried to work one day, but went home and was confined to his bed for two or three weeks. He carried his arm in a sling until about November. A nerve was injured so that he has constant pain in his shoulder, neck, and back. He went back to work about the first of January. The cords are drawn on his shoulder, so that he carries his neck in a cramped position. The injuries to his cervical vertebræ are claimed to be permanent. Dr. Dishong, a nerve specialist, testified that he will never be without a stiff neck, or free from pain. Other doctors testified there was a deviation in his spine of about half an inch; that the reflexes were diminished in his left arm, and he did not have as much muscle there as in his right arm. Fourteen months after the accident he was still under a doctor's care, receiving treatment at least once a week. The plaintiff's testimony indicates that his earnings had decreased at least 50 per cent., and he was unable to earn anything from the date of the injury on August 1 until January 1 following. He and his wife both testified to the severe pain which he had suffered for months.

The defendant, to offset this evidence, introduced exhibits Nos. 7 and 8, being two reels of moving pictures, which had been taken by Felber Maasdam, an industrial cinematographer. He testified that he spent parts of September 15, 16 and 17, 1937, taking these films, with his camera equipped with a telescopic lens. These pictures show the plaintiff around the stockyards, engaged in various activities. The operator was instructed to run the projection machine, to show the normal speed of the movements of the plaintiff, before the jury, not faster or slower. The plaintiff is shown on top of a runway, opening a gate, driving three cows, closing the gate, carrying hay, putting it in feed troughs, inspecting stock, and other movements.

The operator on cross-examination testified he was paid $1.50 an hour and some other expenses for taking the pictures, and $25 a day for running them for the jury in court. He testified that, so far as he knew, the plaintiff had no knowledge that these motion pictures were being

taken during the parts of three days while they were being "shot."

The use of moving pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge. *State v. United Railways & Electric Co.*, 162 Md. 404, 159 Atl. 916, 83 A. L. R. 1307.

It appears to be the defendant's theory that it was absolutely impossible, under the physical facts, for the plaintiff to have been injured as he described.

It is the contention of the defendant that the rear door appliances of car No. 907 were, on the date of the accident, in perfect order. To present its contention to the jury, 12 out of 15 instructions offered by the defendant and refused by the court related to the construction of the door, its operation, and the position the defendant was in.

One of these requested instructions reads as follows: "You are instructed that if you find that the plaintiff in the act of alighting fell and that his fall was not caused by being struck by the doors then you are instructed that your verdict should be for the defendant."

The foreman of the defendant company testified that this car No. 907 was a one-man car; that the operator sits in front and controls the front door by a lever, and that the car can be started whether the front door is open or closed, but that this is not true of the rear door, but that the brakes are in emergency as long as the rear door remains open, and until the rear door is shut and the step raised he can make no contact with his electric power, so the car cannot be started.

After the car stops, the motorman pushes a button, which automatically allows the rear door to open, folding to the front, and the step goes down; so long as a passenger is standing on the treadle or step the car will not start forward, for it is impossible for the car to start until the step is up and the door is closed. Photographs, being exhibits Nos. 12 and 13, show that the rear door opens by folding in the center and being drawn to the front of the opening;

that when entirely open the two halves project out from the car one-half the width of the full door. The edge of the door is covered with a piece of rubber, and if, in closing, the door strikes any object, it is claimed it will fly open again.

The defendant had street car No. 907 brought near the courthouse, at Eighteenth and Harney streets, and connected with power so it would operate, and the foreman of the car shops testified that it was in the same condition as when he inspected it three days after the accident, although he admitted it had been in service and run perhaps a thousand miles since the accident. The defendant made a formal request of the trial court to permit the jury to inspect this street car and observe the operation of the rear door. The court instructed the jury to inspect the car for the limited purpose of examining the operation of the rear door. The jury were instructed not to discuss the operation among themselves, nor talk to any person but the bailiff who accompanied them. If they desired anything in particular done, the bailiff would tell the foreman, Mr. Nelson, who would be out there to operate the car. The court finally cautioned the jury as follows: "I want it expressly understood you are only inspecting this car to give you an idea how it operates generally, and because it operates now in good working condition will not be considered by you as any evidence that it was in perfect operating condition on the day that this accident occurred."

Section 20-1108, Comp. St. 1929, gives the court the right to permit a jury to view property in litigation, or the place where a material fact occurred. Under this law, it was proper for the jury, properly cautioned, to go in a body, in charge of the bailiff, to view the mechanism of a street car for closing the rear door, the same being on a track adjacent to the courthouse. *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 322, 83 N. W. 71.

The result of such observations of the jury is evidence which, in arriving at a verdict, the jury may consider in connection with all other competent evidence. *Stull v. De-*

partment of Roads and Irrigation, 129 Neb. 822, 263 N. W. 148.

The jury must have satisfied themselves that it was possible for the plaintiff to be injured just as he testified, and that such injury was due to the negligence of the defendant company in the operation of the rear door of said street car, or they would not have returned a verdict in his favor. When the evidence is as sharply in conflict as it was in this case, the jury had the advantage of this court in the personal examination they made of the street car, and such examination doubtless had a bearing in the final disposition of the case. A verdict of the jury based on conflicting evidence will not be disturbed unless clearly wrong.

We have examined the other three instructions offered, and refused by the trial court, and there was no prejudicial error in refusing to give them.

The most serious objection in the minds of this court is that the verdict is excessive for the injuries as disclosed by the evidence. The defendant argues that the plaintiff had arthritis in his shoulder and neck before the accident; that he was able to make some effort toward campaigning for the office of county commissioner of Sarpy county, for which he had filed at the time of the accident; that he was confined to his home for only a short time, and within four or five months was back, attending to his business in the stockyards; that his medical expense was only $110.

On the other hand, the plaintiff's counsel argue that he suffered injury to dorsal and cervical nerves, and injuries to back and spine, requiring him to carry his head in an unnatural position, and a diminution of earning capacity of 50 per cent., and that a verdict of $5,000 is not excessive.

This court is satisfied that plaintiff is entitled to a recovery for his injuries, and the record does not warrant a reversal on the ground of passion and prejudice. However, considering his age, and the fact that he had arthritis before the accident, and the work that the moving pictures show he is now able to perform, we have reached the conclusion that the verdict does appear excessive, for the most

favorable view of the evidence does not support a verdict for $5,000.

It is the decision of the court that this judgment should be reduced to $4,000. If the plaintiff within 20 days files a remittitur of $1,000, the judgment will stand affirmed, otherwise it is reversed and remanded.

AFFIRMED ON CONDITION.

LILLIAN PHILLIPS, APPELLANT, V. HERBERT E. PHILLIPS, APPELLEE.

281 N. W. 22

FILED JULY 15, 1938. No. 30334.

1. **Divorce.** Whether a divorce from bed and board or an absolute divorce shall be granted is a question vested in the sound discretion of the trial court, and in the majority of cases an absolute divorce, with permanent alimony, is to be preferred.
2. ———: ALIMONY. Even though the petition of the wife is denied, and an absolute divorce granted the husband, yet in such a case the wife may be granted reasonable alimony, under the restrictions of section 42-318, Comp. St. 1929.
3. ———: ———. In fixing the amount of alimony, the court will take into consideration the estate of each party at the time of marriage, their respective contributions since marriage as well as the duration of the marriage, and the conduct of each party leading up to the divorce.
4. ———: ———. The court may also consider the wife's loss of interest in her husband's property, and in her social standing, if any is shown, and to which party the decree was granted, their respective ages, earning ability, and condition of health, and all other pertinent facts and circumstances, and award alimony in such an amount as appears fair and equitable between the parties.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

John A. McKenzie, for appellant.

O'Sullivan & Southard, contra.

Heard before ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

PAINE, J.

Plaintiff brought action for a decree of separate maintenance on the ground of extreme cruelty. The court dismissed her petition, and granted her husband an absolute divorce on the specific grounds of cruelty set out in his cross-petition, but granted to plaintiff certain household furniture and $3,000 permanent alimony, and an attorney's fee of $250, from which decree the plaintiff has appealed.

The three assignments of error are: (1) Error in dismissing her petition; (2) error in awarding a decree of divorce to defendant; (3) in fixing the sum of only $3,000 as permanent alimony.

The evidence discloses that the plaintiff has been married and divorced twice before, and was 44 years of age at the time of trial. The defendant had been married and divorced once before, and was 47 years old. They were married at Grand Island May 31, 1932, and lived together for about five years. No issue has been born as a result of any of these marriages. The defendant was very anxious to keep their marriage a secret, because it was so soon after his divorce, and did not want the other employees at Paxton & Gallagher's to know he was married. He had his telephone listed in the name of "E. Phillips." Defendant has worked for Paxton & Gallagher Company for 24 years, and during the time of their marriage drew a salary of $240 a month as their buyer of automotive equipment, and explains the listing of the telephone because he did not want traveling salesmen to call him at all hours of the night at his home.

Plaintiff complains that the husband was at times sullen and morose. She says that, for the last six months they lived under the same roof, he never spoke to her but once, when he brought home a Christmas turkey.

When friends visited them, the husband would mix up cocktails from the liquor he kept on hand, but did not drink much himself. He charges in his cross-petition that the plaintiff drank to excess at home and elsewhere, causing him great humiliation, which is sustained by the evidence.

In the decree entered November 2, 1937, the trial judge found generally that the defendant had conducted himself properly toward the plaintiff as a husband, but that the plaintiff had been guilty of conduct which amounts in law to extreme cruelty, and awarded the defendant an absolute decree of divorce; that the home at 4351 Mason street, Omaha, has been acquired since the marriage, and that, of the original purchase price of $2,800, the plaintiff contributed $1,000; that the remaining $1,400 and some $650 spent in repairs and remodeling were earned by the defendant since their marriage; that at the time of the marriage the plaintiff was possessed of stocks, bonds, and securities of the present market value of $1,122.53, and, in addition, about $200 in cash; that the defendant owns stocks, bonds, and securities of the market value of $2,914.64, and has acquired since his marriage 100 shares in the Fontenelle Brewing Company, of the market value of $200; that, in addition, the defendant has $1,104 in cash, and certain life insurance policies, the cash surrender value of which have increased $733.80 by premium payments since the marriage, and owns certain vacant lots in Council Bluffs and land in Colorado of the market value of $1,050. He owns an automobile worth $500, and household furniture of $400. The court awarded to the plaintiff, for her $1,000 interest in the home, for her interest in the household furniture, and for permanent alimony, the sum of $3,000, and, in addition, all household furniture and articles of ornament owned by the plaintiff at the time of her marriage, together with an attorney's fee of $250.

We will now consider the three assignments of error and the propositions of law in support thereof. The first error is in dismissing her petition for separate maintenance and granting the husband the divorce on his cross-petition. In some cases a divorce is refused to both parties.

In *Brown v. Brown,* 130 Neb. 487, 265 N. W. 556, no children were born to the union, and it was found that the plaintiff's allegation of extreme cruelty was not supported by a preponderance of the evidence, and her petition, as

well as the husband's cross-petition for divorce, was dismissed, and neither was granted any relief.

The statute authorizes a divorce from bed and board, which the plaintiff prayed for in the case at bar, but the husband in his cross-petition asked for an absolute divorce. It has been found in most cases far better for the parties to be granted an absolute divorce, with permanent alimony, than to be granted a separate maintenance.

In *McKnight v. McKnight,* 5 Neb. (Unof.) 260, 98 N. W. 62, it was held that whether a divorce from bed and board or an absolute divorce shall be granted is vested in the sound discretion of the trial court.

In *Sutherland v. Sutherland,* 132 Neb. 558, 272 N. W. 549, a decree granted the wife support and separate maintenance, but at a subsequent term of court the husband secured an absolute divorce, and the question came up whether it was error to grant the husband an absolute divorce without granting the wife any alimony. It is stated that awarding the wife separate maintenance did not prove satisfactory; that quite often much embarrassment is caused the parties by these partial dissolutions of the marital relation.

In *Moravec v. Moravec,* 123 Neb. 830, 244 N. W. 639, it was held that, although a divorce was denied to the wife and a divorce granted to the husband upon his cross-petition on the ground of extreme cruelty, the court may grant to the wife reasonable alimony.

In the case at bar, the evidence fully supported the trial court in awarding an absolute divorce to the husband upon his cross-petition.

We now come to the consideration of that branch of the case affecting the property rights of the parties. The third assignment of error is the objection of the plaintiff and appellant to awarding her the sum of only $3,000 as permanent alimony. In her brief it is set out that, as the plaintiff had invested $1,000 of her own money in the home which they purchased, and as the home is given to the defendant, that $1,000 is simply returning her own money

which she had before her marriage, and that the actual alimony granted is only $2,000.

Section 42-318, Comp. St. 1929, provides that the wife may be granted alimony in every case except only when the divorce was granted to the husband upon the grounds of adultery committed by the wife, and further provides that the alimony granted shall be just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and "all other circumstances of the case."

It was said in *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771, that alimony had been granted in various sums, from one-half of the husband's property down to a small fraction thereof, and many Nebraska cases were reviewed therein. To consider "all other circumstances of the case," required by the statute, places the burden upon the court of making a patient, detailed study of every fact and circumstance in each case presented for disposition, and the plaintiff's counsel in her brief insists that the court take into consideration the wife's loss of interest in her husband's property, and in the comforts and luxuries of life which would have been enjoyed by her except for the enforced separation, as well as the social standing which she had by the marriage in the case at bar.

In a general way, a class of cases has been considered where the parties, possessing only health and ambition, were married in their youth and poverty, and after long years of joint efforts accumulated considerable property, and each has been equally responsible for the accumulations, representing years of work. When such a marriage is dissolved, very liberal alimony decrees have been awarded. In some cases the property is divided equally, even though the title to the farm stands wholly in the wife's name. *Bartunek v. Bartunek,* 109 Neb. 437, 191 N. W. 671. On the other hand, in the pen-written decree of S. B. Pound, trial judge in *Shafer v. Shafer,* 10 Neb. 468, 6 N. W. 768, he granted the husband the divorce, but found he had secured more from the farm of his wife than he was entitled to, and, there-

fore, he should pay to her $1,000 alimony, which was reversed by this court, and she received nothing, except $125 a year for the support of the two children of said marriage. Thus, we see that the amount of alimony always depends upon the facts in each particular case.

In a second class of cases, it is found that the results of years of married life have brought little property, but a large family, some being of tender years at the time of the divorce, and, the custody of the minor children being given to the mother, the alimony and support money granted is determined largely by the situation, and always lacks much of being adequate to meet the needs of either, but courts are powerless in many such cases.

There is a third class of cases, where the parties are mature, often experienced in domestic relations by reason of a former marriage or two, and where there have been no children as a result of the union. The case at bar falls naturally into this class. Let us examine our court's disposition of some of these cases.

We find that the duration of the marriage is a very important point. In *Walton v. Walton,* 57 Neb. 102, 77 N. W. 392, the parties lived together but six months; she did not contribute in any way to the accumulation of property, valued at $24,000. The insanely jealous temperament of the husband led to his extreme cruelty, practiced in many forms, and this court, in a very long opinion by Commissioner Ragan, affirmed a decree giving her alimony of $5,000, with attorney's fees of $700.

In *Barton v. Barton,* 126 Neb. 835, 254 N. W. 561, the marriage only lasted four months, whereupon the wife brought an action for separate maintenance on the ground of extreme cruelty, and the husband asked for an absolute divorce in his cross-petition. The husband's property was valued at some $55,000, and the wife amended her petition for separate maintenance and was granted an absolute divorce, with alimony of $6,500.

In *Berdolt v. Berdolt,* 56 Neb. 792, 77 N. W. 399, the parties were married in 1894; no children. They lived together

less than one year. The wife was given alimony of a Steinway piano and other furniture, all of the value of $1,000, and $5,000 in money. This court directed a remittitur of $3,500, leaving cash alimony of only $1,500. The value of the defendant's property was very much in dispute. In an ardent courtship he had written her a letter, found in the bill of exceptions at page 251, in which he told her he was worth $20,000, but finally, in the course of the trial, shrunk his clothing store at Seward and his mortgages and other property down to a value of only $3,576.39.

In *White v. White*, 112 Neb. 850, 201 N. W. 662, the parties were married in 1915, the husband being 60 and the wife 40 years of age, both previously married. The marriage was unhappy. Judge Shepherd, in writing the opinion of this court, said that they were set in their ways; "neither of them appears to have had the rare temper of mind and heart to take them over their rough places. * * * These parties did not measure up to the requirements of a successful second marriage experience." There were no children. This is one of the largest records brought to this court. The husband's property amounted to $110,000; the alimony given was $17,000. There was an antenuptial agreement for only $10,000. He contends she should be limited to alimony of only $10,000. It is said: "The course of judicial decision in Nebraska indicates a tendency on the part of courts to deal generously with the unsuccessful wife in those cases where the fault is not intentionally planned and maliciously practiced." This is especially true where the husband is at fault. The husband began the suit when the wife was sick, emaciated, suffering toxic goiter and pelvic ailment. Alimony of $17,000 was affirmed.

In the case of *In re Estate of Waller*, 116 Neb. 352, 217 N. W. 588, the parties were both over 60 years of age, were married in 1922, and lived together about a year in Omaha. Both had been married before, and each had children by the former marriage. The wife obtained a decree of divorce on the ground of extreme cruelty, with $1,000 alimony and $150 attorney's fees. Forty-three days after the

decree was rendered the husband died, and she brought action to secure the widow's share of his estate, valued at $22,000, on the ground that the decree of divorce would not become final until six months after it was entered. In the antenuptial contract which they had signed, it was agreed that if his wife survived him she should be paid $1,000 from his estate within six months after he died. The court found that the antenuptial agreement was procured by fraud, as the wife was a recent arrival from Germany and could neither write nor understand the English language, and did not know her lawful marriage rights at the time. It was held that the widow was entitled to the widow's share in the estate, less the sum of $1,000 already received by her as alimony.

Coming now to a consideration of marriages lasting more than a year, we have *Felton v. Felton,* 131 Neb. 488, 268 N. W. 341. The defendant was granted a divorce on her cross-petition. There were no children as the result of this marriage, although he had three children by a former marriage. While the land owned by the parties was encumbered by real estate mortgages to the amount of $35,100, yet they differed in the value of the equities of the seven tracts of land. The husband, drawing a good salary, which was much larger than in the case at bar, was directed to pay the wife $1,900, at the rate of $100 a month, additional to the $3,100 ordered by the trial court.

In *Bristol v. Bristol,* 107 Neb. 321, 185 N. W. 972, the parties lived together for about five years. The plaintiff was a widow, the mother of several children. The defendant was 48 years of age, and divorced from his former wife. No children were born to this union. At the time of the marriage the plaintiff owned two farms and considerable other property, and was only indebted in the sum of $200. The defendant conducted a garage, and owned only two second-hand automobiles, of the value of $500. Defendant at once undertook the complete management of plaintiff's farms, without very much success. He claims he enhanced the value of her property $8,000, but perhaps overlooked

the fact that they were compelled to sell a portion of her property, and she had become responsible for debts in excess of $3,600, and the trial court found that the defendant had not contributed over $1,650 to her property. Defendant appealed to this court, and plaintiff filed a cross-appeal on the ground that there was no authority in law to allow the husband alimony out of the wife's property. This court affirmed the trial court in giving the husband an automobile, truck, and tools valued at $650, and Liberty bonds worth $400, but found that the court erred in giving him an additional $600 as a charge against the property of the plaintiff, and that portion was eliminated.

In *Dickerson v. Dickerson,* 26 Neb. 318, 42 N. W. 9, the parties were married in 1861, and in 1886 the wife abandoned the husband and removed to the state of Arkansas, and refused to return. It is said that, even though a divorce is granted to the husband, except on the ground of adultery, he should not be permitted to retain all of the property, while she is put away to the charity of the world. The court finds the fair value of the husband's real and personal property to be $5,000, and awards her the sum of $1,400, in payments of $200 a year for seven years.

In *Mills v. Mills,* 88 Neb. 596, 130 N. W. 419, the parties were hard-working; the wife worked as cook in country hotels part of each year for 17 years. Defendant was a hard worker, but cruel, unfeeling, and harsh in his treatment of his wife. The wife secured a divorce for extreme cruelty after 30 years of married life. The farm and property were worth not to exceed $6,600. The wife, being 64 years old, infirm and weak, was granted $2,500 permanent alimony.

In the case of *Tietken v. Tietken,* 60 Neb. 138, 82 N. W. 367, the parties lived together six and a half years, and each had been married before. The husband was 63 and the wife 56 years of age at the time she brought action for extreme cruelty for striking and beating her and excessive use of intoxicants. The trial court found that defendant's property consisted of an Otoe county farm and other property,

all of the value of $9,679, and the award of $1,000 alimony to the wife was upheld by this court.

In the case of *Bigelow v. Bigelow*, 131 Neb. 201, 267 N. W. 409, no children were born to the union, although each had children by former marriages. The value of the property was found to be between $30,000 and $35,000, and the wife was granted an absolute divorce upon her cross-petition, and the alimony of $7,500 was increased $1,000 by this court.

Now, from this very inadequate survey of these few cases, where no children were born as a result of the marriage, and the property has been accumulated largely, if not entirely, by the husband, we find that our court has allowed alimony of less than 5 per cent., and up to 40 per cent., of the property, and the average is around 15 per cent. in this class of cases. Yet, each particular case must be determined solely by the evidence of the witnesses in that action.

In considering the amount of alimony that a court is to allow in such a divorce case, the court will take into consideration the estate of each party at the time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties.

In the case at bar, the wife had property of the value of $1,322.53, and the husband's holdings were valued at $13,107.24 at the time of marriage. There had been a shrinkage in values, so that after the trial it is claimed she will have property of the value of perhaps $1,300, and the return of the $1,000 she invested in the home, and cash alimony of $2,000. On the other hand, the defendant's counsel argue that, after he has paid the alimony of $3,000 and

the costs and attorney fees, he will have left property of a present value of less than $8,000.

As these parties are both capable and intelligent, and in good health, each having in the past been able to earn good wages, we have reached the conclusion that the disposition made of this case by the trial court was right, and its decree is hereby affirmed. In addition to the attorney fees heretofore allowed, of $250, the plaintiff's counsel is allowed $100 for services in this court.

AFFIRMED.

NICK G. BESKAS, APPELLANT, V. GLEN A. CALKINS, APPELLEE.

281 N. W. 29

FILED JULY 15, 1938. No. 30332.

1. **Partnership.** A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services.
2. **Pleading.** The trial court has a wide discretion in the granting of leave to amend pleadings during and after trial, and such amendments are properly allowed if in furtherance of justice so that the pleadings may conform to the proof which has been adduced.
3. **Appeal.** In an equity suit, triable *de novo* in this court, where the evidence is conflicting and cannot be reconciled, this court will, in arriving at its conclusion, consider the fact that the trial judge saw the witnesses and had a better opportunity to judge as to their credibility.

APPEAL from the district court for Morrill county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Neighbors & Coulter, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and MESSMORE, JJ., and RYAN, District Judge.

RYAN, District Judge.

This was an action for an accounting of the affairs of a partnership between plaintiff and the defendant. The trial

court found that there was nothing due the plaintiff from the defendant, but that there was due the defendant from the plaintiff the sum of $410.44 on his cause of action numbered one and one-half and the further sum of $438.78 on his second cause of action, and entered judgment accordingly. From this judgment the plaintiff has appealed to this court.

The plaintiff makes seven assignments of error, but has argued only two of them, namely, that the court erred in finding that the evidence failed to establish plaintiff's claim for compensation for work and labor in caring for the cattle fed by the partnership, and secondly that the court erred in permitting the defendant to amend his answer and cross-petition after trial by inserting a new cause of action numbered one and one-half.

Briefly stated the facts are that the plaintiff and defendant on or shortly prior to January 16, 1932, entered into a partnership for the purpose of buying and feeding cattle. The plaintiff at the time and prior thereto was a tenant on a farm owned by the defendant in Morrill county, Nebraska. The partnership lost money on all of its feeding operations. Plaintiff in his brief makes no complaint of the amount found due by the court on the second cause of action. His argument is confined to the disallowance by the court of his claim for compensation for caring for the cattle and to the permitting of the amendment to defendant's cross-petition after trial. The evidence of the plaintiff upon the proposition that he was to be compensated for caring for the cattle is found on page 9 of the bill of exceptions. Plaintiff testified: "Mr. Daniels (he was the agent of the defendant) asked me, 'How, Nick, would you prefer to take care of the stuff?' I says, 'Whatever you think is right I am willing to do; as a general thing it is around 40 or 50 cents a head per month for a fellow to take care of cattle.' And that is all the conversation we had there." When asked if he had any other talk with Mr. Daniels about what he was to receive for taking care of the cattle, he answered, "Not afterwards, no." He further testified that when he and Daniels were

attempting to reach a settlement that Daniels said, "I know, Nick, you are entitled to interest and some work, but we lose anyhow." Q. "He said you were entitled to something? A. Yes."

Leo Daniels testified that he at no time agreed that the plaintiff should be paid for feeding and looking after the cattle, and that the first time the subject was brought up by the plaintiff was in December, 1935, when they were trying to reach a settlement of their accounts, and that he then told him that "he was not entitled to anything for feeding the cattle."

That a partner is not entitled to charge the partnership account for his services, in the absence of a special agreement, is well-settled law. "By the contract of association, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of value; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences." *Beatty v. Wray*, 19 Pa. St. 516. "In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for individual services, or to an increase of authorized compensation, unless it is allowed by contract." *Efner v. Reynolds*, 105 Neb. 646, 181 N. W. 552. See *Lamb v. Wilson*, 3 Neb. (Unof.) 505, 97 N. W. 325; *Lamb v. Wilson*, 74 Neb. 73, 103 N. W. 1134. This rule has been approved and applied, from time to time, even when the services of the several partners in behalf of the common enterprise have not been equal either in extent or in value.

It is elementary law that to prove an express contract there must be shown what amounts to a definite proposal, and an unconditional and absolute acceptance thereof. *Melick v. Kelley*, 53 Neb. 509, 73 N. W. 945. The evidence on the question of an express agreement for compensation to the plaintiff for the care and feeding of the cattle handled by the partnership is in direct conflict and the court correctly decided that question in favor of the defendant.

This case was tried on October 22 and 23, 1936; briefs were submitted by the parties, and on December 18, 1936, the court entered judgment for the defendant in the sum of $824.49; on January 30, 1937, plaintiff's motion for a new trial was overruled; on January 30, 1937, defendant filed a motion for leave to amend his answer and cross-petition to conform to the proof by adding cause of action numbered one and one-half. This cause of action set up a claim for the sum of $1,017.45 for various amounts claimed due defendant from the plaintiff covering feeding and farming transactions during the years 1931 to 1935, on which plaintiff had paid the sum of $600, leaving a balance of $417.45. On February 16, 1937, the court on its own motion set aside and vacated its judgment of December 18, 1936. On June 22, 1937, defendant's motion for leave to amend was argued, and leave granted defendant to amend his answer and cross-petition, and on the same day the judgment appealed from was rendered.

The general rules with reference to the permitting of amendments to pleadings during trial and after trial have often been stated by this court. In *Gage v. West,* 62 Neb. 612, 87 N. W. 344, it was stated that the trial court has wide discretionary powers in granting amendments to pleadings, and that it was an abuse of discretion by the trial court to refuse an amendment to a reply tendered in furtherance of justice. A pleading may be amended after judgment when the amendment offered does not substantially change the claim or defense, and conforms to the facts proved. *Berwyn State Bank v. Swanson,* 111 Neb. 141, 196 N. W. 125. This is especially applicable where as in this case the testimony tending to prove the additional facts pleaded was in the record without objection. *Catron v. Shepherd,* 8 Neb. 308, 1 N. W. 204; *Whipple v. Fowler,* 41 Neb. 675, 60 N. W. 15; *Scroggin v. Johnston,* 45 Neb. 714, 64 N. W. 236. In the trial of this case counsel for both sides went into all of the transactions set forth in the amendment to the answer and cross-petition, and tried the cause just as though the items inquired about had been put in

issue by the pleadings. There was no abuse of discretion by the trial court in permitting the amendment.

It would serve no useful purpose to set out in detail the items in the accounts of the plaintiff and the defendant. Indeed, there is little substantial dispute in their testimony as to the various items of feed and hay and other commodities involved. The plaintiff testified that he kept no books; he had nothing to show but the checks he paid and he admitted getting credit for all of them. The evidence is in some respects irreconcilably in conflict. The rule is that, where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in an equity suit, will consider the fact that the district court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

There is no prejudicial error in the record and the judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1938

ANNA WARE, APPELLEE, V. HOME MUTUAL INSURANCE ASSOCIATION OF IOWA, APPELLANT.
281 N. W. 617

FILED OCTOBER 7, 1938. No. 30392.

1. **Insurance: EVIDENCE: TELEPHONE CONVERSATION.** A telephone listed in a current telephone directory in the name of an insurance corporation writing indemnity automobile accident insurance is an implied invitation to a policyholder to use the telephone for the transaction of proper business relating directly to his policy, and he may do so, though he does not recognize on the telephone the voice of the person assuming to act for insurer.
2. ———: ———: ———. The holder of a policy of automobile accident insurance on his automobile may, by use of a telephone listed in the current telephone directory in the name of insurer, procure a transfer of his insurance to another automobile owned by him, if there is no increase in the insurance risk or in the premium already paid.
3. ———. The statutory provision that an insured's breach of a condition of his insurance policy will not avail the insurer to avoid liability, unless it contributes to the loss, is by construction a part of the insurance contract. Comp. St. 1929, sec. 44-322.
4. **Principal and Agent.** "Ostensible authority to act as agent may arise if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, allows third persons to act on such apparent agency." 2 C. J. 461, sec. 70, note 8 (b).

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

L. R. Doyle, for appellant.

Perry, Van Pelt & Marti and *A. J. Denney, contra.*

Heard before ROSE, C. J., EBERLY, DAY, PAINE and MESSMORE, JJ., and KROGER, District Judge.

ROSE, C. J.

This case involves the liability of Home Mutual Insurance Association of Iowa, defendant, on a policy of indemnity insurance for bodily injury, resulting from an automobile accident, during the term of one year beginning May 12, 1934. The insurance was written on a Chevrolet coupé owned by Morris D. Meyer, who sold it August 11, 1934, while the policy was in force, and purchased a Chevrolet coach subsequently involved in an accident.

When George Heinrich was operating the coach owned by Meyer, September 2, 1934, it collided with another car and Anna Ware, plaintiff, was injured as a result of the accident. She sued both Meyer and Heinrich for damages and recovered an 800-dollar judgment against them for personal injuries March 28, 1935. Execution on the judgment was issued February 7, 1936, and returned by the sheriff *nulla bona.*

Seeking application of Meyer's insurance to the judgment in favor of plaintiff, and pleading facts essential to such relief, including the allegation that the insurance was transferred to the coach, though originally written to cover the coupé, she procured a summons in garnishment which was served upon the insurer and required it to disclose in court any credit of the judgment debtors or any property in its possession or under its control belonging to either of them. In answering the summons, garnishee alleged it owed them nothing and had in its possession nothing belonging to them; answers challenged by plaintiff as false.

The Home Mutual Insurance Association, defendant, garnishee, pleaded in defense of alleged liability for indemnity that the insurance coverage on the Chevrolet coupé which was sold prior to the accident September 2, 1934, was never extended to damages caused by Heinrich while he was driving the Chevrolet coach when plaintiff was injured, ex-

clusive authority to change insurance coverage to the coach having been committed to the president of insurer alone and not exercised prior to the accident. Indebtedness of insurer to Meyer or Heinrich in any form was denied. Facts constituting a defense to the garnishment were put in issue by a reply.

Upon a trial of the issues raised by the pleadings in the proceedings in garnishment, the jury rendered a verdict in favor of plaintiff for $1,029.66. From judgment therefor defendant appealed.

Insufficiency of the evidence to support a judgment in favor of plaintiff, failure to direct a verdict for defendant and errors in the instructions are the principal questions raised by the assignments of error.

The trial court submitted to the jury the controverted issues that, prior to the accident, the insurer waived its president's written indorsement on the policy changing the indemnity insurance from the coupé to the coach and that it made the change through its state agency in Lincoln—methods of transfer at variance with provisions of the policy. The sufficiency of the evidence to sustain the verdict in favor of plaintiff on those issues is the controlling question on appeal.

Many of the facts are admitted by the insurer or shown by it or proved by plaintiff without contradiction. The Home Mutual Insurance Association, insurer, defendant, writes in Nebraska in large volume indemnity accident policies of insurance on automobiles. For the purpose of its business in Nebraska it maintains a state agency in Lincoln with an office telephone listed in the Lincoln directory in the name of "Home Mutual Ins. Ass'n." In that agency Maynard V. Mills is state agent with power to appoint soliciting agents, solicit applications for insurance, collect premiums, and receive applications and data from policyholders for the transfer of insurance from one automobile to another. Such information was accepted from a policyholder or any one acting for him. Mills' office employee in the performance of the duties of his agency was Bernice

Fisher, who was required to answer the telephone, take care of the mail and the books and receive notice, applications and data for change of car indorsements on policies. George Rowe, adjuster for insurer, and his stenographer, Pauline Schriber, occupied an office in the Lincoln agency, the latter performing services for both Mills and George Rowe. Forms for change of car indorsements on policies were printed by the thousand including the facsimile signature of H. J. Rowe, as president of insurer. Applications by policyholders for these indorsements were received at the Lincoln agency at the rate of one to three a day. Attention to them was generally given the day they were received. Ordinarily the change was made as a matter of course. Insurer admitted the issuance of the policy May 14, 1934, for the term of one year; the accident with the Chevrolet coach September 2, 1934; the 800-dollar judgment. The policy was never canceled. No part of the premium was ever returned to the policyholder. The insurance risk and the premium on the coach were no greater than on the coupé. The facts narrated are clearly shown by the record.

There is, however, a violent conflict in the evidence on the issues that, prior to the accident, the state agency at Lincoln was notified that Meyer sold his coupé and bought the coach, that he applied there for a transfer of the insurance on the coupé to the coach, giving the necessary data, and that he was assured the change had been made. The president of insurer testified in effect that no one but himself had authority to extend the insurance on the coupé to the coach or to make such an indorsement on the policy; that, prior to the accident, no application for the change or necessary information therefor was received by insurer or by any one authorized to make such a change; that it was not made prior to the accident. There was testimony of a similar import by the state agent and by the two girls who assisted him in the state agency at Lincoln.

On the contrary, Morris H. Foist testified in substance that as sales agent he sold both the Chevrolet coupé and the Chevrolet coach to Meyer; that Meyer told him not to

deliver the coach without insurance on it and asked him to get the insurance on the coupé transferred to the coach; that Foist, by telephone which was listed in the current telephone directory in the name of insurer, called the state agency of insurer at Lincoln and talked to a woman in the office there; that she checked records to see if Meyer had insurance; that he gave her the motor number, the serial number and the price of the coach and asked her to make the transfer and that she said she took care of it; that Foist called the office of insurer in Lincoln in the forenoon on the date of the sale and delivered the coach in the afternoon of the same day, prior to the accident. The evidence is that insurer already had the premium for insurance. There was testimony that Meyer was told prior to the accident that he had insurance on the coach and that he believed he was thus protected. The jury believed the witnesses who testified on behalf of plaintiff.

The refusal of Meyer to take possession of his coach until after it had been insured was a precaution naturally prompted by the perils of a motorist on a public highway. Wreck-strewn arteries of travel, hospitals thronged with maimed and mutilated persons who had been occupants of automobiles and morgues filled with dead victims of negligent operators of motor vehicles warn purchasers of passenger cars to procure indemnity insurance promptly. The system of underwriting to which witnesses for defendant testified required from one to three days for communications between Lincoln and Des Moines to perfect a transfer in Nebraska of insurance from one car to another, while the premium remains in the hands of insurer without any increase in insurance risk or in premium.

H. J. Rowe, president of insurer, testified to an instance in which the change of car indorsement was dated at Des Moines January 25, 1937, and the effective date of the change was January 22, 1937, the latter date being the date of the request for the change and January 25, 1937, being the date on which the stenographer issued the formal indorsement of the change.

The witness who called the "Home Mutual Ins. Ass'n" by telephone had a right to assume he was invited to do so for the purpose of transacting proper insurance business relating to a policy in force and that the person answering the call under that name was speaking for that insurer, though the voice of the speaker was not recognized. *Connolly v. Davis*, 114 Neb. 556, 208 N. W. 626. When the witness applied for a transfer of insurance from one car to another he was not told there was no one there with authority to grant the application and that it would take from one to three days to transact the business with the home office at Des Moines. If the state agency at Lincoln had no actual authority to make the transfer, there is evidence it had apparent or ostensible authority to do so.

The suspension or forfeiture of Meyer's insurance from the time he sold the coupé and purchased the coach August 11, 1934, until September 5, 1934, after the accident, while the premium remained in the hands of insurer, is necessarily involved in the defense. The insurer was bound by the following statutory provisions:

"The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Comp. St. 1929, sec. 44-322.

These provisions are parts of the insurance contract which is not a device to procure and retain a premium and escape liability in the event of an honest loss. The failure to procure in writing the indorsement of the president on the policy did not contribute to the loss. Apparent or ostensible authority of an agent or an agency has been defined in many forms. Some of the definitions follow:

"Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency." 2 C. J. 573—citing *Northwest Thresher Co. v. Eddyville State Bank*, 80 Neb. 377, 114 N. W. 291;

Phoenix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055.

"An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him." 2 C. J. 427.

"Ostensible authority to act as agent may arise if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, allows third persons to act on such apparent agency." 2 C. J. 461, sec. 70, note 8 (b)—citing *Triller v. Sadle*, 92 Neb. 579, 138 N. W. 728; *Cooper & Cole Bros. v. Cooper*, 90 Neb. 209, 133 N. W. 243; *Faulkner v. Simms*, 68 Neb. 295, 299, 89 N. W. 171, 94 N. W. 113.

A proper view of the entire record and of the law applicable to the evidential facts leads to the conclusion that the verdict is sustained by sufficient evidence and consequently that the insurance of Meyer was in effect at the time of the accident and that the insurer waived its president's written indorsement on the policy, transferring the insurance on the coupé to the coach. With the controlling issues thus determined, error prejudicial to insurer has not been found in the proceedings and judgment of the district court. Plaintiff is allowed a fee of $100, taxable as costs, for services of her attorneys in the supreme court.

AFFIRMED.

STATE, EX REL. JAMES T. ENGLISH, APPELLEE, V. JACOB RUBACK, APPELLANT.

281 N. W. 607

FILED OCTOBER 7, 1938. No. 30365.

1. **Constitutional Law.** The constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it

includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter.

2. Criminal Law: UNFAIR PRACTICES ACT. Section 3 of the unfair practices act (Laws 1937, ch. 137), including penalties provided for a violation thereof, examined in connection with the context, and *held* to be indefinite, uncertain and void.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed and dismissed.*

Irvin C. Levin, for appellant.

Richard C. Hunter, Attorney General, Bert L. Overcash, James T. English, Thomas C. Quinlan and *Raymond E. McGrath, contra.*

Allen, Requartte & Wood, Fred S. White and *Peterson & De Voe, amici curiæ.*

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

EBERLY, J.

This is a proceeding in equity for an injunction restraining the alleged violation by defendant of section 3 of the Nebraska unfair practices act (Laws 1937, ch. 137). The defendant answered the plaintiff's petition by, first, a general denial; and, further, that such section 3 of the unfair practices act violates and transgresses "the due-process clause of the Fourteenth Amendment of the Constitution of the United States," also "the Fifth Amendment" thereto, also "section 3 of article I of the Bill of Rights of the Constitution of the state of Nebraska;" that it "tends to fix prices in businesses not clothed with a public interest;" "that it is special class legislation affecting, injuring and discriminating against large masses in favor of the few;" and that it "creates a monopoly and an unlawful combination, and is in violation of articles VIII and IX of chapter 59 of the Compiled Statutes of Nebraska for 1929."

There was a trial to the court, evidence being introduced by plaintiff alone, and at the close thereof defendant moved for a dismissal "for the reason that the state has failed to

establish a cause of action against the defendant." The district court overruled this motion, and, on further consideration of the evidence, a decree was entered enjoining the violation of "section 3, of Legislative Bill 137, of the laws of Nebraska for 1937" (unfair practices act). Laws 1937, ch. 137, sec. 3. From the action of the trial court overruling his motion for a new trial, the defendant appeals.

The essential portions of the unfair practices act presented for our consideration are as follows:

"Sec. 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade where the effect of such sale below cost, or the giving, offering to give, or advertise the intent to give away any article or product, or service, or the output of a service trade, *may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors* of such person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state." (Italics supplied.)

Section 10 of this act, in effect, provides that the violator of section 3 shall "be deemed guilty of a misdemeanor for each single violation, and, upon conviction thereof, shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court."

It will be noted that, as a part of the offense created and defined by section 1 of the unfair practices act, the words "with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person," etc., are

made an essential element of this particular statutory offense. But no similar provision forms a part of section 3 of the unfair practices act on which the instant proceeding is based.

The factual situation involved in the instant case is the sales by defendant, in the usual course of business as owner of a retail grocery store in Douglas county, in two transactions, in the first whereof two pounds of M.J.B. coffee were sold at retail for 50 cents, the cost price of which to defendant had been, within 30 days prior to such sale, the sum of 51 cents; and in the second transaction, two pounds of Hills Brothers coffee were sold at retail for 53 cents, the replacement cost of which to defendant then was 51 cents; and that defendant had advertised the intended sale of such goods, and others, at cut prices in the Omaha World Herald prior to the making of such sales.

On the subject of the rights of ownership and enjoyment of personal property, the Constitution of the state of Nebraska contains the following pertinent provisions, viz.:

"All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Const. art. I, sec. 1.

"There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law." Const. art. I, sec. 25.

"No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, sec. 3.

On this general subject, our court has said, viz.: "This common-law right of property is secured by our Constitution. It declares that 'no person shall be deprived of life, liberty, or property, without due process of law.' The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all Constitutions of the states—

are said to mean the same thing; and it is quite clear that they are indifferently used in Constitutions for the same purpose. They are said to refer to a preexisting rule of conduct, and designed to exclude arbitrary power from every branch of the government. *State v. Doherty,* 60 Me. 504, 509; *Norman v. Heist,* 5 W. & S. 171; *State v. Simons,* 2 Spear, 761, 767. Hence, these terms do not mean merely a legislative enactment; for, 'If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled, and destroyed; *and be deprived of his property,* his liberty, and his life," without crime? Yet all this he may suffer, if an act of assembly simply denouncing these penalties on particular persons, or a particular class of persons be in itself a law of the land within the sense of the Constitution.' *Hoke v. Henderson,* 4 Dev. 1, 15." *Atchison & Nebraska R. Co. v. Baty,* 6 Neb. 37. See, also, *Ex parte Newman,* 9 Cal. 502; *Ex parte Quarg,* 149 Cal. 79, 84 Pac. 766; *Ex parte Dickey,* 144 Cal. 234, 77 Pac. 924; *In re Smith,* 193 Cal. 337, 223 Pac. 971; *People v. Pace,* 73 Cal. App. 548, 238 Pac. 1089.

The conclusion is that the constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State v. Sperry & Hutchinson Co.,* 94 Neb. 785, 144 N. W. 795; *In re De Klotz,* 98 Neb. 861, 155 N. W. 240; *Hall v. State,* 100 Neb. 84, 158 N. W. 362; *Tyson & Brother v. Banton,* 273 U. S. 418; *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522; *Ribnik v. McBride,* 277 U. S. 350; *Williams v. Standard Oil Co.,* 278 U. S. 235; *New State Ice Co. v. Liebmann,* 285 U. S. 262; *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation,* 299 U. S. 183.

The preliminary question now presented, in view of the essential nature of the transactions involved, is a mere sale of groceries, a transaction in no manner affected with a public interest. Does the language of section 3 of the unfair practices act possess the requisite definiteness to properly define a legal offense? It contains no definition of criminal intent, or of evil or criminal purpose, or of guilty knowledge. It is to be remembered that innocence must always be presumed. Under the terms of such section 3, criminality must be determined and punishment inflicted wholly without reference to the intent, purpose or actual knowledge of the seller, solely because, as a result of what is done, such act "may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors."

In *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 10, it was stated: "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."

Likewise, in *Connally v. General Construction Co.*, 269 U. S. 385, we find the following language: "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

The statutory language employed by the controlling statute in defining the offense makes use of the word "may," apparently for the obvious reason of enlarging its scope

and lightening the burden of proof. The word "may" includes in its definition "possibilities."

"In one of its usable senses the verb 'may' comprehends the idea of possibility, and, so used, becomes equivalent to the expression 'might possibly;' it has been defined as to be possible. It may comprehend further the idea of probability, and also the thought of what is, with more or less certainty, to be expected. Whether it carries the thought of probability, or of possibility and not probability, often depends on the context. It has been said that it comprises all the possible rather than the reasonably probable consequences, but that it is not to be taken as including every conceivable possibility, and that it must be reasonably applied, having in mind the purpose in view." 39 C. J. 1394.

"In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty." 16 C. J. 67.

"The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czarra v. Board of Medical Supervisors*, 25 App. Cas. (D. C.) 443. (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States v. Capital Traction Co.*, 34 App. Cas. (D. C.) 592, 19 Ann.

Cas. 68; *United States v. Washington R. & E. Co.*, 34 App. Cas. (D. C.) 599." 16 C. J. 68, note 10.

See, also, *Ex parte Jackson*, 45 Ark. 158; *Stoutenburgh v. Frazier*, 16 App. Cas. (D. C.) 229, 48 L. R. A. 220; *State v. Gaster*, 45 La. Ann. 636, 12 So. 739; *Augustine v. State*, 41 Tex. Cr. Rep. 59, 52 S. W. 77, 96 Am. St. Rep. 765.

It is obvious that the terms of the statute under consideration are indefinite and uncertain. The elements of the crime it attempts to define and punish are not so clearly expressed that the ordinary person is apprised in advance as to what course it is lawful for him to pursue, and the intent and purpose of the sovereign is not clearly declared. Under these circumstances, and it being a rule of this court that a statute will not be declared unconstitutional unless necessary to the proper disposition of the pending case (*Howarth v. Becker*, 131 Neb. 233, 267 N. W. 444), the constitutional questions will not be discussed or determined.

It follows that the portion of the statute quoted, even when taken in connection with the context, is void and of no effect, and is insufficient to sustain a prosecution thereunder or civil proceedings based thereon. Thus, in overruling appellant's motion to dismiss the action, the trial court committed reversible error.

The judgment of the district court is, therefore, reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

THURSTON COUNTY ET AL., APPELLANTS, V. JAMES CHMELKA ET AL., APPELLEES.

281 N. W. 628

FILED OCTOBER 7, 1938. No. 30371.

1. **Schools and School Districts.** When a school district treasurer succeeds himself in that office, he changes his official personality, for each term of office is a separate and distinct entity.
2. ———: TREASURER: LIABILITY. The delivery of a claim, based on a certificate of deposit in an insolvent bank, to himself as his

successor, is not a payment which will relieve a school district treasurer, or the sureties on his bond, from liability.

3. ———: ———: ———. A school district treasurer is liable on his official bond for school funds coming into his hands which were lost by reason of the insolvency of a bank in which he had deposited them, notwithstanding he acted in good faith in the selection of such bank.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed.*

Zacek & Nicholson, for appellants.

Robert G. Fuhrman, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

This is a law action, brought in the name of Thurston county by eight resident taxpayers, on behalf of themselves and of all taxpayers of School District No. 6, Thurston county, asking judgment against a school district treasurer and a surety on his bond in the sum of $1,500. At the close of the evidence, the court discharged the jury, dismissed the action, and the lien of an attachment upon certain property was discharged. Plaintiffs appeal.

The following facts, taken from the bill of exceptions, are not in dispute: James Chmelka was elected school treasurer for said district for the year beginning with July, 1927. In October of the same year he deposited $1,500 of school funds in the Liberty State Bank of Thurston. This bank had been closed by the Guaranty Fund Commission early in the year 1927, and had then been allowed to be reopened under certain restrictions. James Chmelka was not a stockholder nor an officer in the bank, and did not make the deposit arbitrarily, but it was made only after consultation with the other officers of the school district. Five months after the deposit was made, the Guaranty Fund Commission decided that the bank should not continue to remain open, even under restrictions, and in March, 1928, a receiver was appointed. On April 5, 1928, James Chmelka

filed a claim on behalf of School District No. 6 in the amount of $1,500, with $36.83 accrued interest, on certificate of deposit No. 809, dated October 21, 1927, and said claim was allowed. While the record is not clear as to what occurred at the annual school meeting in 1928, James Chmelka continued to act as school treasurer, but no new bond was given for such second year. In November of that year, being in failing health, he decided to go to California. A special meeting of the school board was called for November 20, 1928, when his resignation was accepted, and he turned his books and money on hand to his successor. In reference to the claim filed by him the year before for $1,536.83, he went to the county attorney of Thurston county, who drew up an assignment of the claim which he had filed, and he delivered such assignment drawn by the county attorney to his successor as school treasurer, who continued to carry in his book as cash on hand the money represented by the assignment of such claim.

This action is brought against James Chmelka, treasurer of School District No. 6, and William Jasa as one of the sureties upon the bond which he gave on July 16, 1927, which bond was in the sum of $6,000 and duly approved by the moderator and director of said school district. The other surety on the bond, William Korth, died some years ago, and his estate was fully settled and administered.

We find in the records a first dividend check from the assets of the insolvent bank, dated May 15, 1930, for $122.95, and a second dividend check, dated April 19, 1932, for $72.23, both of which are indorsed on the back by J. S. Rihanek, treasurer of School District No. 6, who testified that this matter was brought up at annual school meetings and voted upon, and the annual school meeting always voted against seeking this money from James Chmelka by a great majority. He also stated that there were certain taxpayers in the district who during all of that period demanded that the board of the school district take some action, but the board declined to do so, and finally this action was brought by certain taxpayers.

The ruling of the trial court in dismissing the case at the close of the evidence was based upon an oral motion made by the appellees, setting forth that the evidence was insufficient to support a judgment, and that it was clearly shown that James Chmelka did turn over all of the funds of the school district at the termination of his office. The motion further set out that the evidence failed to show any breach of the condition of the bond during the one year in which said bond was effective. The defendant William Jasa moved the court to dismiss the action as against him on the ground that the evidence fails to establish any breach of the condition of the bond prior to the 1st day of July, 1928, which was the maturity date of said bond. After argument the court sustained each of said motions.

This action was commenced on December 11, 1934, and would have been barred if it had been an action against said Chmelka for failure to turn over the money of the district, but this action is strictly an action upon the bond signed by Chmelka and Jasa, his surety, which bond terminated on July 1, 1928, the action, therefore, being that he deposited money in a bank which failed, and in that he failed to turn over the money to his successor, who was himself.

In this case James Chmelka was short in his accounts from the day on which the Liberty State Bank was adjudged insolvent. He was bound to pay over to his successor in office the amount represented by the certificate of deposit held by him, and this he did not do. He was bound to account to himself as successor the same as he would have accounted to another treasurer who might have been elected on July 1, 1928, as he is an insurer of the funds of said school district, and must pay the same over to his successor, which he did not do. It is the law that, when a man is reelected to the same office, he changes his official personality; that each term of office is an entity separate and distinct from all other terms of the same man in the same office. *Thomssen v. Hall County,* 63 Neb. 777, 89 N. W. 389.

It is contended by the appellants that a school district

treasurer and his bondsman are liable for funds deposited in a failed bank, which liability became fixed at the end of the term in which the funds were lost.

The delivery of an assignment of a certificate of deposit in an insolvent bank by a school treasurer to his successor is not a payment, and will not relieve the outgoing treasurer, or the sureties on his bond, from liability. A school treasurer was required to pay over the money in his final settlement under the law then in force. *Cedar County v. Jenal,* 14 Neb. 254, 15 N. W. 369; *State v. Hill,* 47 Neb. 456, 66 N. W. 541; *Douglas County v. Broadwell,* 96 Neb. 682, 148 N. W. 930; *Bush v. Johnson County,* 48 Neb. 1, 66 N. W. 1023.

It may be that some of the later opinions of this court are not strictly in point with our decision, for in 1931 the legislature passed chapter 141, providing for making a bank a legal depository for school district funds, and under certain conditions a treasurer would not longer be liable on his bond for money lost in such depository bank. These sections became section 77-2525 to section 77-2527, Comp. St. Supp. 1933, but were repealed by chapter 5, Laws 1935, which chapter enacted a new law relating to the deposit of school district funds.

This court has recently held that a county judge was liable on his official bond for trust funds coming into his hands which he lost by reason of the insolvency of a bank in which he had deposited them, notwithstanding he may have acted in good faith and without negligence in the selection of such depository. *Knox County v. Cook,* 126 Neb. 477, 253 N. W. 649.

The appellees concede that this action was properly brought by taxpayers of the school district in the name of the county of Thurston, the obligee named in the bond as the nominal plaintiff. There is no contention in this case that a school district, by vote at its annual meeting or in any other way, has power or authority to forgive an indebtedness due to such district. *Ward v. School District No. 15,* 10 Neb. 293, 4 N. W. 1001, 35 Am. Rep. 477. There

is no dispute that James Chmelka became treasurer of the school district in July, 1927, or that he deposited $1,500 of his checking account in the Liberty State Bank in the form of a certificate of deposit, bearing date October 21, 1927, and that on March 10, 1928, the said bank was adjudged to be insolvent by the district court for Thurston county.

A school treasurer entrusted with funds of his district must keep them safely at his peril. He is an insurer of the funds in his hands, and if he deposits such funds in a bank and they are lost by the insolvency of the bank, that does not relieve the school treasurer from the duty of accounting for all public funds which were lawfully in his possession. This may be a harsh rule, but this highest standard of responsibility is based on public policy.

This court has thus reached the conclusion that the trial court erred in its findings, and the judgment of dismissal is hereby

REVERSED.

ROSE RICHARDS, ADMINISTRATRIX, APPELLEE, V. MATHIAS ABTS, APPELLANT.
281 N. W. 611

FILED OCTOBER 7, 1938. No. 30497.

1. **Workmen's Compensation**: WILFUL NEGLIGENCE. "Reckless indifference to safety," as used in the workmen's compensation law, section 48-152, Comp. St. 1929, means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance. *Farmers Grain & Supply Co. v. Blanchard*, 104 Neb. 637, 178 N. W. 257.
2. ———: ———: PROOF. Any competent evidence tending to show knowledge by the employee of the dangerous character of the act which subsequently caused his death should be received in evidence where the defense is wilful negligence by the employee.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

F. J. Reed, for appellant.

James H. Anderson, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an appeal from an award of death benefits under the workmen's compensation law. The record discloses that the defendant, Mathias Abts, had been engaged in blacksmithing in the village of Morrill, Nebraska, for many years and that William Richards, the deceased, had been employed in the shop since 1932. A part of the shop's equipment was an oxo-acetylene welding torch which was used by both the defendant and the deceased in their work. On October 12, 1937, an empty molasses tank of 500-gallon capacity was brought into the shop for the purpose of having some leaks repaired. This tank was made of thin sheet metal, equipped with an air pump on the front end of it and with pipe fittings at the rear end for draining the contents and was mounted upon an automobile chassis.

The evidence shows that deceased pumped some air into the tank in order to locate the leaks from the sound of the escaping air. After locating the leaks, the deceased, without reducing the air pressure in the tank, proceeded to weld the tank with the oxo-acetylene torch hereinbefore mentioned, with the result that it exploded and caused the death of the deceased. It is agreed by the parties that the accident arose out of and in the course of the employment. The sole defense offered was that deceased was guilty of wilful negligence that would bar a recovery under the provisions of sections 48-109, 48-110, 48-127, and 48-152, Comp. St. 1929.

There is evidence in the record that the welding of a closed container without removing the hazard of an explosion by opening the vent was well known to the trade to be highly dangerous. Evidence was offered by the defendant to the effect that he had warned the deceased of the danger.

This evidence was excluded and no complaint is made of the ruling. The evidence of one Gibson was offered, however, to the effect that he had warned the deceased of the danger on several occasions. This evidence was excluded by the trial court and we think this constituted prejudicial error. Whether or not the acts of the deceased constituted wilful negligence is dependent upon his knowledge of the danger and his willingness to disregard it and maintain a course of conduct indicating a reckless indifference for his own safety. The evidence offered tended to throw light upon that issue and it should have been received in evidence and considered by the court.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

OSCAR A. HOFFMAN, APPELLANT: IDA M. HOFFMAN ET AL., INTERVENERS, APPELLANTS, V. LEMUEL D. GEIGER ET AL., APPELLEES AND CROSS-APPELLEES: WHITEBREAST FUEL COMPANY ET AL., INTERVENERS, CROSS-APPELLANTS.

281 N. W. 625

FILED OCTOBER 11, 1938. No. 30246.

1. **Corporations.** The liability of a stockholder for corporate debts, if the corporation fails to publish annual notice of them, is created by statute. Comp. St. 1929, sec. 24-213.
2. ———. A civil suit to enforce liability of stockholders for failure of the corporation to publish notice of its debts is in its nature an action to recover a penalty for nonperformance of a statutory duty.
3. **Limitation of Actions.** A civil action to recover a statutory penalty must be commenced within a year after the cause of action accrued in favor of plaintiff. Comp. St. 1929, secs. 20-201, 20-208.
4. ———. The liability of stockholders for the penalties arising from failure to publish notice of corporate debts does not accrue under the statute until "after the assets of the corporation are first exhausted." Comp. St. 1929, sec. 24-213.
5. **Corporations.** A stockholder who is a creditor of the corporation cannot maintain an action against the other stockholders to re-

cover penalties imposed by statute for a failure to publish notice of corporate debts, where his own liability for breach of corporate duty in respect to such notice is the same as that of other stockholders summoned as defendants.

6. ———. The word "exhausted," as used in the statute imposing penalties for failure to publish notice of corporate debts, refers to "assets of the corporation," and does not necessarily mean in addition the exhausting of the entire proceeds of the sale of the assets and also application thereof to corporate debts.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. Opinion on motion for rehearing of case reported in 134 Neb. 643. *Former judgment of reversal vacated and judgment of district court affirmed.*

Arthur Balis, for appellants.

O. B. Clark, for cross-appellants.

Ralph S. Moseley, J. W. Kinsinger, Woods, Aitken & Aitken, John J. Ledwith, R. O. Williams, George Risser, William Niklaus, Field, Ricketts & Ricketts, Sterling Mutz, William Holt and *McKillip & Barth, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

The litigation in this case was commenced by Oscar A. Hoffman, plaintiff, against Lemuel D. Geiger and others as stockholders of the Globe Delivery Company, an insolvent corporation, to enforce an alleged liability created by statute for failure of the corporation to publish notice of corporate debts. Comp. St. 1929, sec. 24-213.

Plaintiff stated in his petition that the suit was brought on behalf of himself and all other creditors similarly situated. The amount of his claim was $2,867.29, reduced by dividends of $678.97 in bankruptcy to $2,188.32. He stated further that listed, enumerated and proved claims of creditors aggregated $21,859.54, and that there were no funds or property for payment of debts except $5,176.33. The petition was filed May 24, 1934. Ida M. Hoffman and

Charles F. Hoffman intervened as additional plaintiffs and presented claims similar to that of Oscar A. Hoffman, the original plaintiff, and pleaded they were suing also on behalf of other creditors similarly situated. The petition and amended petitions of the three Hoffmans were assailed by motions and by demurrers of defendants. All of the Hoffmans had been stockholders of the bankrupt corporation when defaults in the giving of notice occurred.

Nine creditors, not stockholders of the corporation, intervened April 10, 1935, and each pleaded a claim for a debt of the corporation and liability of the stockholders therefor on the ground that notice of corporate debts had not been published pursuant to law.

A statement of the case appears at greater length in a former opinion. *Hoffman v. Geiger,* 134 Neb. 643, 279 N. W. 350. The district court sustained demurrers to petitions and to amended petitions of the Hoffmans and to petitions of the nine intervening creditors who had not been stockholders. Dismissal of the entire proceeding followed. On appeal the Hoffmans were designated as "appellants" and the intervening nine other creditors, who were not stockholders, as "cross-appellants." Upon a review of the record, the dismissal of appellants' case was affirmed and that of cross-appellants reversed. *Hoffman v. Geiger,* 134 Neb. 643, 279 N. W. 350.

On motion by defendants for a rehearing in the supreme court, adverse parties were permitted to argue the proposition that the claim of cross-appellants is barred by the one-year statute of limitations, and that consequently the dismissal of the entire proceeding should have been affirmed. A conclusion in the affirmative has been reached after further arguments in the briefs and at the bar and after reexamination of the pleadings and the law applicable to them.

The liability of a stockholder for corporate debts, if the corporation fails to publish annual notice of them, is created by statute. Comp. St. 1929, sec. 24-213.

A civil suit to enforce liability of stockholders for failure

of the corporation to publish notice of its debts is in its nature an action to recover a penalty for nonperformance of a statutory duty. *Bourne v. Baer*, 107 Neb. 255, 185 N. W. 408.

A civil action to recover a statutory penalty must be commenced within a year after the cause of action accrued in favor of plaintiff. Comp. St. 1929, secs. 20-201, 20-208. See *Bourne v. Baer*, 107 Neb. 255, 185 N. W. 408.

The liability of stockholders for the penalties arising from failure to publish notice of corporate debts does not accrue under the statute until "after the assets of the corporation are first exhausted." Comp. St. 1929, sec. 24-213.

The following propositions are stated and vigorously argued by counsel for cross-appellants, the nine intervening creditors who are not stockholders:

"As it appears from the allegations of the original petitions of interveners that the assets of the bankrupt were not exhausted and a judicial determination of that fact was not made until April 14, 1934, the petitions filed April 10, 1935, were filed less than one year after the cause of action accrued. * * *

"The action having been begun by plaintiff for himself and on behalf of all other creditors, including interveners, on May 24, 1934, less than three months after appellees contend the cause of action accrued, the filing of plaintiff's petition inured to the benefit of interveners, and even though interveners had not filed their petitions until the period allowed by statute had elapsed they would not have been barred by statute from recovery."

There seem to be fallacies in the argument on these propositions. A stockholder who is a creditor of the corporation cannot maintain an action against the other stockholders to recover penalties imposed by statute for a failure to publish notice of corporate debts, where his own liability for breach of corporate duty in respect to such notice is the same as that of other stockholders summoned as defendants. *Singhaus v. Piper*, 103 Neb. 493, 172 N. W. 523.

The petitions of the Hoffmans who alleged they sued for

all other creditors similarly situated did not inure to the benefit of cross-appellants to prevent the bar of the statute, because the two classes of creditors in litigation were not similarly situated. The Hoffmans were stockholders when the corporation failed to publish statutory notice of its debts and could not maintain their action, because they were chargeable with the same liability as the stockholders whom they sued. The district court properly sustained demurrers to their petitions, to their amended petitions, struck their pleadings from the files and dismissed their suits and proceedings. The dismissal as to them was properly affirmed on appeal and is not now open to controversy.

As already stated, the cross-appellants, the nine intervening creditors, were in a class different from that of the Hoffmans. The futile pleas of the latter to litigate for others were not permanently adopted by cross-appellants who were not handicapped as stockholders liable for corporate debts. By intervening and demanding independent relief, they disavowed the pleas of the Hoffmans in their behalf. They did not borrow from the pleas of other litigants immunity from the statute of limitations. The date on which the first petitions were filed and the allegation therein that the action was brought by the petitioners for the benefit of other creditors similarly situated did not inure to the benefit of cross-appellants in a different situation. In this view of the pleadings there is nothing on the face of the record to keep the claim of cross-appellants alive more than a year after their cause of action accrued.

Cross-appellants contend further that they presented their claim in court less than a year after their cause of action accrued, since, as they argue, it did not accrue until after the property and assets of the bankrupt corporation were exhausted and the proceeds thereof applied to adjudicated claims of creditors.

The word "exhausted," as used in the statute imposing penalties for failure to publish notice of corporate debts, refers to "assets of the corporation," and does not necessarily mean in addition the exhausting of the entire pro-

ceeds of the sale of the assets and also application thereof to corporate debts. *Bourne v. Baer*, 107 Neb. 255, 185 N. W. 408. Approving the ruling in the *Bourne* case as sound, the petitions of cross-appellants herein show on their face that the assets of the insolvent corporation were judicially exhausted by sale and that the court of bankruptcy ordered distribution of the proceeds to allowed claims of creditors as early as March 24, 1934. Cross-appellants then knew the nature and amount of their claims against the stockholders, but did not file their petitions until April 10, 1935, more than a year after the cause of action accrued.

The ruling in *Bourne v. Baer*, 107 Neb. 255, 185 N. W. 408, was binding on federal courts, but seems to have been overlooked in *Hansen v. Welch, Cook, Beals Co.*, 49 Fed. (2d) 576, holding that assets are not exhausted until the final dividend is paid to creditors and that fact judicially determined. The opinion in the *Bourne* case seems to contain a proper interpretation of the Nebraska statute in relation to the exhausting of assets of insolvent corporations and there is no sufficient reason for a departure therefrom in the present case. It follows that the former opinion herein, in so far as it directs a reversal of the judgment of the district court, is erroneous. To that extent it is overruled, the reversal set aside and the judgment below affirmed in its entirety.

JUDGMENT ACCORDINGLY.

RUDOLPH KLAPKA, APPELLEE, V. NORA E. SHRAUGER, APPELLANT.

281 N. W. 612

FILED OCTOBER 11, 1938. No. 30395.

1. **Contracts: RESCISSION.** "Rescission or cancellation will not be granted for a mere breach (of contract) not so substantial and fundamental as to defeat the object of the parties in making the agreement." *White v. Massee*, 202 Ia. 1304, 211 N. W. 839.
2. **Infants: DEEDS.** "Any deed of an infant is voidable only, so that the title passes by it and remains in the grantee until some

clear act of disaffirmance is done by the grantor after coming of age." 8 R. C. L. 949, sec. 23.

3. **Vendor and Purchaser:** CONTRACT: BREACH. "A covenant by a purchaser to pay, and by the vendor to convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, at least, proof of readiness and willingness to perform." *Nicolopoolos v. Hill*, 59 A. L. R. 185 (217 Ala. 589, 117 So. 185).
4. **Contracts:** RESCISSION. "It is not every breach of a contract or failure exactly to perform—certainly not every partial failure to perform—that entitles the other party to rescind. A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract." 12 Am. Jur. 1020, sec. 440.
5. **Vendor and Purchaser.** Where time is not of the essence of the contract, the vendor is entitled to a reasonable time and opportunity to secure or perfect the title.
6. ———. If the date of possible and probable performance is fixed and definite, and not far in the future, courts will be liberal in allowing the vendor a reasonable time to perform where there is no provision in the contract that time is of the essence of the contract.
7. **Specific Performance.** "In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless (i) the contract expressly states that performance at or within a given time is essential, or (ii) the nature of the contract, in view of the accompanying circumstances, is such that enforcement will work injustice." Restatement, Contracts, 406, sec. 276 (e).

APPEAL from the district court for Pawnee county: VIRGIL FALLOON, JUDGE. *Reversed.*

Kenneth S. Wherry and *J. A. McGuire*, for appellant.

Marcus L. Poteet, Charles A. Dafoe and *Hall, Cline & Williams, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

This is an action for the rescission of a land sale con-

tract and to recover the payment of $1,000 made by the plaintiff to the defendant at the time the contract was executed. The defendant denied breaches of contract set out in plaintiff's petition, and alleged the delivery of possession of the land to the plaintiff and his entry into possession, and his continued possession thereof for six months, and asked that the contract be reformed. The court entered a decree finding for the plaintiff, and giving him judgment for $1,000, with 6 per cent. interest, and dismissed the cross-petition of the defendant, from which defendant appeals.

The evidence of the defendant is to the effect that she first met the plaintiff when he came to her home with his wife in the summer of 1934 and asked her if she would sell him a 120-acre farm located east and north of Pawnee City, Nebraska. She told him she would think it over and let him know, and finally offered to sell it to him at $75 an acre. Plaintiff said the price was too high, as it had a lot of bindweed on it, and he was not interested at that price. Plaintiff later had a friend correspond with her to get a lower price. This man, Frank Oxner, of Belle Plaine, Iowa, concealing the fact that he was acting for plaintiff, finally made an appointment by long distance telephone to meet them at the bus station in Wymore, but when she and her daughter went to Wymore to meet the bus on August 20, 1936, it turned out that the plaintiff, Rudolph Klapka, was there instead of Frank Oxner. He did not want anybody to see him as he was driven through Pawnee City. He was driven out to the farm, and looked around a little, and told her he knew the place better than she did. Plaintiff was anxious to buy the place, and insisted that a contract be drawn up that night. The terms of the contract were agreed upon. Defendant testifies that he wanted to move on the place immediately, and defendant said that she had another farm to which Mr. Yarpe, her tenant, could move. Plaintiff would not go to town, but stayed at the farm which he was buying and talked to the tenant while the defendant drove to Pawnee City and had Mr. Halderman, a business man, pre-

pare the contract, because she could not get her attorney. After the contract was drawn, the defendant and her daughter and Mr. Halderman drove back to the farm, about six miles from Pawnee City. Plaintiff was not at the farm, but was found at the defendant's home, waiting for them. It was then between 9 and 10 o'clock at night. Mr. Halderman read the contract over to plaintiff, and plaintiff and defendant signed the contract.

The contract was dated August 20, 1936, and provides for the sale of the 120-acre farm for $7,000, of which $1,000 cash was paid by check that night. Defendant was to pay one-half of the 1936 taxes, and possession of the premises was to be given March 1. Then follows this paragraph: "Party of the first part to execute a warranty deed showing the above land to be clear of all encumbrance, and deposit the same in escrow with the Citizens State Bank, Pawnee City, Nebraska, and to be delivered to the party of the second part upon his paying $3,000 and executing a first mortgage on the above land for $3,000 at five per cent. to run for two years from March 1st, 1937, to the party of the first part."

A careful examination of this contract discloses that it contains no statement to the effect that time is of the essence of this contract.

The next day after signing the contract plaintiff came back to the farm with Mrs. Shrauger, the defendant, and told the tenant he had bought the place and wanted to get possession. Defendant thereupon gave the tenant another farm. Plaintiff took possession of the said real estate on September 1, 1936, moving his family, consisting of his wife and two sons, with all live stock, farming machinery, and equipment onto said farm he had purchased, and continued in such possession and control until on or about March 6, 1937.

In February, 1937, the plaintiff came to defendant's home and complained that there was a shortage of water on the farm he had bought, and demanded that she give him back $500 on his first payment of $1,000 on the purchase

price, which she refused to do. A few days later the defendant received a written notice, dated February 27, 1937, from Attorney Witte, a copy of which appears in the bill of exceptions as exhibit No. 3, and in which she is notified that said attorney has examined the agreement signed up August 20, 1936, and the abstract of title, and that she has breached the agreement by not depositing in escrow a deed that would convey title to said real estate, and that she must of necessity breach the agreement further on March 1, 1937, because it will be impossible for her to convey title that day; that his client elects to and does rescind the agreement; that she may have her abstract by demanding the same at the office of said attorney, and that his client will in no way interfere with her possession of the real estate, and in conclusion said notice demanded the immediate payment of $1,000 which had been paid by the plaintiff to the defendant on August 20, 1936.

The petition of the plaintiff admits the execution of the contract, and charges that upon the date the contract was executed the defendant owned only a one-third interest in the land she contracted to convey, one-third interest belonging to her son, John Shrauger, and the other one-third interest belonging to her daughter, Ena June Shrauger, who was then a minor and incapable of conveying said real estate, and that such defendant had led the plaintiff to believe that on the date of the execution of the contract she was the sole owner of the real estate, and that he relied thereon until February 26, 1937, when he discovered the defendant's inability to perform said contract; that the defendant's breaches of said contract are material, and for that reason the plaintiff has elected to and has rescinded the contract, and asks judgment for return of the $1,000 cash payment made upon the signing of the contract.

Plaintiff also alleged in his petition that on March 1, 1937, the defendant tendered to the plaintiff a deed executed by the defendant and by her son, John Sterling Shrauger, and also executed by Ena June Shrauger, who was a minor, who would arrive at her majority June 13,

1937. The evidence discloses that this daughter, Ena, was in her twentieth year, and drove the automobile to the bus station in Wymore to meet the plaintiff when he arrived, and was with her mother the night the contract was drawn up, and brought the same out to their home, where it was duly read to the plaintiff and executed by him and by her mother, the defendant herein. She assisted materially in all of the negotiations leading up to the signing of the contract, and duly executed a warranty deed conveying her interest therein, although she was not yet 21 years of age at the time of signing the first deed.

The defendant, in her amended answer and cross-petition, denies that any breach of the contract occurred, and as a part of said amended answer and cross-petition tendered into court a warranty deed, executed by herself and son, and by the daughter after she had become 21 years of age, together with an abstract of title showing merchantable title in the three grantors, and defendant asked the court to reform the contract to show the true intention of the parties was that a deed would be given by the defendant and her son on March 1, 1937, and the interest of her daughter be conveyed by deed to be given on June 13, 1937, and defendant asked the court for a decree of the specific performance of the contract as thus reformed.

Plaintiff in his reply denied all new matter, and the trial court found for the plaintiff, and gave judgment for the return of the $1,000, from which defendant appeals.

The plaintiff insists that, when a vendor contracts to sell and convey land, and is unable to comply with the terms of his contract, the vendee is entitled to recover back any payments made on the purchase. *Durland Trust Co. v. Augustyn,* 110 Neb. 800, 195 N. W. 172. Plaintiff also insists that, if a written contract for the sale of real estate fixes no definite time for the delivery of the deed, yet if from the context it is apparent that in contemplation of the parties it must be delivered before a certain time, then the court should construe the contract to mean that the delivery should be within a reasonable time, and on or before the

date at which it must be delivered, in order to carry out the terms of the contract. *Fletcher v. Brewer,* 88 Neb. 196, 129 N. W. 288. It is further contended by the plaintiff that "An ambiguity in a written contract prepared by one of the parties should ordinarily be resolved in favor of the party who did not prepare it." *People's State Bank v. Smith,* 120 Neb. 29, 231 N. W. 141. The plaintiff further insists that, if the vendor is absolutely unable to perform at the time agreed upon, the purchaser need not tender performance, and under such circumstances he is not bound to pay or tender payment of unpaid purchase money, or to give security for the unpaid purchase money, for the law does not require the doing of a vain thing. 66 C. J. 818; 40 A. L. R. 696, Ann.

To meet these propositions of law laid down by the plaintiff, the defendant says that, where both parties fail to perform on the day named, they will be held to have waived strict performance as to time. The contract will remain otherwise unimpaired. Dysart, Mortgage Foreclosures, sec. 178; *Cadwell v. Smith,* 83 Neb. 567, 120 N. W. 130. And, again, that where time is not made the essence of a contract the vendor is entitled to a reasonable time to procure or perfect his title. 57 A. L. R. 1519, Ann. If an infant affirms a contract after attaining majority, the contract may not thereafter be voided on the ground of infancy. *First Nat. Bank v. Guenther,* 125 Neb. 807, 252 N. W. 395.

These conflicting citations are quite confusing, and depend upon the facts in each case. We have failed to find any decision exactly in point, in Nebraska or in other jurisdictions, on a similar state of facts to the case at bar.

"Rescission or cancelation will not be granted for a mere breach (of contract) not so substantial and fundamental as to defeat the object of the parties in making the agreement." *White v. Massee,* 202 Ia. 1304, 211 N. W. 839, 66 A. L. R. 1434.

It is said: "The decided weight of authority now is that any deed of an infant is voidable only, so that the title passes by it and remains in the grantee until some clear

act of disaffirmance is done by the grantor after coming of age." 8 R. C. L. 949, sec. 23. See *Curtice Co. v. Kent,* 89 Neb. 496, 131 N. W. 944.

"A party who has substantially broken the contract cannot rescind it on the ground that the other party subsequently refuses or fails to perform." 12 Am. Jur. 1018, sec. 438.

"A covenant by a purchaser to pay, and by the vendor to convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, at least, proof of readiness and willingness to perform." *Nicolopoolos v. Hill,* 59 A. L. R. 185 (217 Ala. 589, 117 So. 185).

"It is not every breach of a contract or failure exactly to perform—certainly not every partial failure to perform—that entitles the other party to rescind. A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom. A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement." 12 Am. Jur. 1020, sec. 440. See *Schlake v. Healey,* 108 Neb. 35, 187 N. W. 427.

Many cases hold that, where time is not of the essence of the contract, the vendor is entitled to a reasonable time and opportunity to secure or perfect the title. In such cases a sudden determination to end the transaction will not be permitted without giving the vendor a reasonable length of time in which to perform. The question as to what is a reasonable time is one for the court to determine. If the time of such performance is uncertain and indefinite, the other party is not required to keep himself in readiness to perform; but, on the other hand, if the date of possible and probable performance is fixed and definite, and not far in

the future, courts will be liberal in allowing the vendor a reasonable time to perform where there is no provision in the contract that time is of the essence of the contract. *Nass v. Munzing,* 100 N. J. Eq. 421, 136 Atl. 344.

"Unless the nature of a contract is such as to make performance on the exact day agreed upon of vital importance, or the contract in terms provides that it shall be so, failure by a promisor to perform his promise on the day stated in the promise does not discharge the duty of the other party." Restatement, Contracts, 406, sec. 276 (a).

"In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless (i) the contract expressly states that performance at or within a given time is essential, or (ii) the nature of the contract, in view of the accompanying circumstances, is such that enforcement will work injustice." Restatement, Contracts, 406, sec. 276 (e).

In the case at bar, the relations between the members of the defendant's family, the mother and son and daughter, are shown to be very friendly. The mother was the legal guardian of her 20-year-old daughter, and had the right and assumed to speak and act for all three of them in renting the farm to a tenant, and in signing up the contract to sell this farm. The son and daughter signed every deed the mother presented to them relating to this farm sale.

A severe hardship will be worked upon the defendant through the enforcement of the forfeiture, which is clearly out of proportion to the damages caused by the breach in the alleged failure of the minor daughter to be able to transfer her interest in the land for 105 days after March 1. The plaintiff was put in peaceable possession of the farm on September 1, and remained so until several days after March 1, when he voluntarily moved out. This court cannot see what hardship he would have suffered in remaining in possession a short time longer until the daughter could

affirm her deed already given by giving an additional deed after she became of age.

This court has reached the conclusion that the trial court erred in entering its decree for the plaintiff, and the same is hereby

REVERSED.

LENA EATON, ADMINISTRATRIX, APPELLANT, V. GERALD MERRITT ET AL., TRUSTEES, ET AL., APPELLEES.
281 N. W. 620

FILED OCTOBER 11, 1938. No. 30394.

1. **Negligence.** "Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." *Omaha Street R. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209.
2. ———: DIRECTION OF VERDICT. "Where the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the duty of the court to direct a verdict for the defendant." *Ritter v. Hering*, *ante*, p. 1, 280 N. W. 231.
3. ———: CONTRIBUTORY NEGLIGENCE. "Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." 45 C. J. 942.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Good & Simons, for appellant.

Chambers, Holland & Locke, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an action for damages for wrongful death, instituted in the district court for Lancaster county by Lena

Eaton, administratrix of the estate of Arthur Eaton, deceased, against the defendants, appellees, Gerald Merritt and Roger L. Merritt, as trustees of the D. H. Merritt estate and individually. At the conclusion of plaintiff's evidence, defendants moved for a directed verdict, which the court sustained. Plaintiff appeals.

The allegations of negligence relied on by plaintiff may be summarized as follows: That defendants operated a truck without proper brakes; that the truck was parked in a position, dangerous and hazardous to life, without brakes and safeguards sufficient to prevent the truck from rolling into an excavation where the deceased was working; that the driver of the truck, knowing of the presence and the position of the deceased in the excavation, negligently and carelessly placed said truck on a slope of the excavation without adequate mechanical appliances to prevent such truck from moving, of its own force of gravity, down into said excavation and upon and against the deceased; that, in the exercise of due care, defendants should have known the position of the deceased and the consequences resulting from dumping the contents of the truck. The answer of the defendants contained a general denial, and alleged negligence on the part of the deceased, and that such negligence was the sole and proximate cause of the accident. The reply was a general denial.

The evidence discloses that on March 11, 1937, Arthur Eaton, a man 65 years of age, with 30 years' experience in the cement and contracting business, was employed to work in an excavation at 1002 South Thirty-second street, in Lincoln, Nebraska. He had as his helper his grandson, Robert Eaton, 19 years of age. They were engaged in putting in footings and had gone to work at about 1:30 p. m. The basement had been dug approximately six feet deep from the ground level and was 30 feet square inside the walls. Arthur Eaton and his grandson were placing the center footing forms. Along the walls and at the edges of the floor of the excavation a wooden form, 15 inches in width and 12 inches high, had been placed, into which ready-

mixed cement was to be poured as a footing. The cement was delivered to the basement by the defendants in a 1930 International gravity truck, with a wheel base of 124 inches, and with an hydraulic lift, which when pulled tripped the lever, and by having more weight in the back than in the front of the box it is overbalanced and dumps. Two loads of cement were delivered to the premises approximately 30 minutes apart. When the first load of cement was delivered there were present C. P. Christiansen, foreman on the job, representing the real estate firm that was building the house, Arthur Eaton, Robert, his grandson and helper, and a salesman of the defendants. When the first load arrived the truck was driven on the south side of the excavation, facing east, and stopped. The driver got out and asked where the cement should be put, and was told by some one on the job where he should place it. The driver backed up his truck to this point in the southeast corner on the south side of the excavation within two or three feet of the excavation. The salesman blocked the truck by placing a piece of concrete under one of its rear wheels. When the concrete was dumped it pushed one of the footing forms in the southeast corner out of place. The truck carries approximately 3,300 pounds of cement. About a half hour after the delivery of the first load, the same driver returned with another load of cement. It was stopped approximately in the same position as on the first delivery. The driver inquired as to where he should place the second load and proceeded to park his truck in position on the east side of the excavation. The general contour of the land to the east of the excavation, where the dirt had been shoveled out from the edge of the foundation for a few feet, was a grade, then leveled off to the east. The back wheels of the truck were placed between eight and ten feet from the edge of the east wall of the basement. The truck faced southeast when stopped on the slope, the slope being approximately 36 inches over a distance of from eight to ten feet. There was a pile of dirt on the north, and in order to get by the dirt the truck had to be backed in on an angle. The front of the truck was a little farther

to the south than the back of the truck. It had been parked on fairly level ground on an angle, with the front wheels cramped to the right, so that they were farther to the south than the back part of the truck. There was a conversation between the driver and Robert Eaton, who was standing in close proximity to the driver. This conversation occurred possibly a minute prior to the accident. Robert Eaton, at the suggestion of the truck driver, blocked the left rear wheel of the truck, using the same slab of concrete as was used in blocking the truck on the first load. It had a surface area of 12 by 14 inches and was approximately four and a half inches in thickness. Robert Eaton testified the driver of the truck stated that he was back as far as he wanted to go, because his brakes were not any good, and he was afraid they would not hold. On cross-examination, referring to the same conversation, young Eaton admitted he had testified in a deposition: "Q. What did you hear of that conversation? A. The driver said he was not sure of the brakes on his truck." The engine of the truck was running; the driver remaining in the cab. When the driver was ready to dump the load, he asked Robert Eaton if they were ready. Robert called to his grandfather, who was in the excavation approximately 12 to 15 feet back of the rear end of the truck, and three to four feet west of the east footing form, holding the form in place with a short-handled shovel, and asked if he was ready. Robert was asked on the stand: "What did you say? A. The truck driver asked me if we was ready to dump the load and I hollered down to my grandfather and asked if he was ready. He hollered back to me he was and I in turn told the truck driver. Q. What did you tell the truck driver? A. I said 'Go ahead and dump it.' * * * Q. And he dumped it? A. Yes, sir." The truck was dumped in the usual manner by force of gravity. The back end of the box went down and the front end up. A corner of the concrete slab under the left rear wheel was broken. When the truck was dumped, it was immediately precipitated down into the excavation. The witness was asked to give the jury a description of the way the

truck backed into the basement, as to the direction it took, and its speed, and he answered: "It would be rather hard to estimate the speed, it went so fast, it happened so quick it would be hard to tell how fast it was going, but the wheels being left in the cramped position they were the truck had a tendency to straighten up from the angle it had been parked. The back end,—in going back down in the hole the back end went around further south and had to go straight. Q. So that after the truck was down into the hole it would be approximately straight east and west then, was it? A. Yes; it was." When the truck went down into the excavation the back wheels were about a foot west of the footing before the truck stopped, while the front wheels were on the bank. The rear end of the truck struck the deceased across the lower abdomen, causing internal injuries which resulted in his death the next morning. The truck was moved forward about a foot and the deceased was taken from under the truck.

C. P. Christiansen was asked as to any conversation had between the truck driver and any others present when the driver arrived with the first load, to which he answered: "On the first load. Well, when the driver backed in all I know he says he don't want to get any closer to the bank than he had to because he didn't know whether his brakes would hold it or not, that is what he said." On cross-examination the witness was asked: "Did you hear any one at any time tell Mr. Eaton not to stand behind the truck? A. Well, the first load. Q. Answer my question. A. Yes, sir. Q. You did hear them tell him that? A. Yes, sir." Asked to tell what was said there, the witness replied: "I was going to say that he did. He said, 'Better not stand back of it,' that is all."

Professor W. F. Weiland, of the engineering faculty of the University of Nebraska, an expert on brakes, testified for the plaintiff, in answer to hypothetical questions, that if the brakes of a truck, such as the one in suit, are adequate the wheels will have to slide, and if the brakes are inadequate the wheels will have to roll. Robert Eaton testi-

fied that the wheels rolled when the truck was precipitated into the excavation. The witness Weiland further testified that if the brakes on the truck had been adequate, taking into consideration the contour of the ground where the truck was parked, then the brakes would have held the truck and kept it from being precipitated into the excavation. He placed no particular credence on the fact that the left rear wheel of the truck was blocked; nor did he in his calculations consider the size of the brake drums, the brake bands, the wheels or tires, which we believe are subjects to be considered.

The issue to be decided is whether or not the evidence adduced is sufficient to take the case to the jury.

In this connection plaintiff cites the case of *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163, wherein it was held: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Plaintiff also cites the case of *Major v. Harrison*, 132 Neb. 363, 272 N. W. 201, and *Plotkin v. Checker Cab Co.*, 133 Neb. 1, 274 N. W. 198. In the latter case, the second paragraph of the syllabus reads: " 'Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning the negligence or lack of negligence of the respective parties, it is error to sustain a motion for an instructed verdict.' *Boomer v. Lancaster County*, 115 Neb. 295, 212 N. W. 613."

In order to analyze the evidence in conformity with the law as announced in the foregoing and other cases, cited in this regard by the plaintiff, we have set out the evidence quite extensively.

It is true, as contended for by plaintiff, that admissions or statements made by a party with reference to defective brakes on a motor vehicle may be used as competent evi-

dence against him, and that all of the facts and circumstances in reference thereto may be considered in determining the relative care to be exercised by the driver. With the Nebraska and foreign authorities cited by plaintiff on this proposition there can be no quarrel.

The cases of *Taulborg v. Andresen,* 119 Neb. 273, 228 N. W. 528, and *Baumann v. Hutchinson,* 124 Neb. 188, 245 N. W. 596, cited by plaintiff, relative to the duty of the operator of a motor vehicle in backing his motor vehicle on a highway, street or public alley, are not pertinent. The truck in the instant case was parked on private property, and was not moving at the time the load was to be dumped.

The evidence does not show the condition of the brakes on the truck at any time immediately subsequent to the accident; nor are we informed as to the defects in the brakes, if any, before the accident. The entire evidence relative to the brakes is the testimony of the driver of the truck and of the witness Weiland. This evidence, standing alone, is insufficient to constitute a cause of action.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." *Omaha Street R. Co. v. Craig,* 39 Neb. 601, 58 N. W. 209. We believe that the evidence in the case at bar conclusively discloses that the driver of the truck did use that degree of care that an ordinarily prudent person would have used under the existing circumstances.

Appellees contend that the deceased was negligent, and that his negligence was more than slight, and, therefore, it was a question of law for the court to determine. Without repeating the evidence, we believe it fairly discloses that the deceased voluntarily placed himself in a position that was dangerous. The parking of the truck was under his direction; he was in charge of the premises; that is, in so far as his work was concerned in having the cement placed where he desired to have it put. The truck driver, in dumping the cement at the direction of deceased or his grandson,

was doing it as an accommodation to lessen their work. The deceased had been previously warned; the plaintiff states it was "casual," but nevertheless it was a warning which might be heeded under the circumstances. He was in a position to see the truck; he must have known that one of its wheels was blocked; he was desirous of keeping the forms from breaking; he used a short-handled shovel braced against the form, and elected to stand in that position. He was ready to have the cement dumped and so stated. He did not conduct himself as an ordinarily prudent person would have done under like circumstances. We are of the opinion that his conduct meets the definition of "contributory negligence," as stated in *Kovar v. Beckius*, 133 Neb. 487, 275 N. W. 670: " 'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.' 45 C. J. 942."

The foregoing definition applies if there is actionable negligence on the part of the defendant, or, in this case, the driver of defendants' truck, and the record does not disclose actionable negligence on his part. However, as a question of law, the court, in considering the negligence, if any, obviously applied the rule as to contributory negligence, which meets the holding in *Ritter v. Hering, ante*, p. 1, 280 N. W. 231, as follows: "Where the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the duty of the court to direct a verdict for the defendant." See, also, *Johnson v. City of Omaha*, 108 Neb. 481, 188 N. W. 122; *Kudrna v. Sarpy County*, 125 Neb. 83, 249 N. W. 87; *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885.

We believe that the facts and circumstances in the instant case warranted the trial court in directing a verdict in favor of the defendants.

AFFIRMED.

JAMES K. LUDWICKSON, APPELLEE, V. CENTRAL STATES ELECTRIC COMPANY ET AL., APPELLANTS.

281 N. W. 603

FILED OCTOBER 11, 1938. No. 30432.

1. **Workmen's Compensation Law**: CONSTRUCTION. "It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797." *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.
2. ———: TOTAL DISABILITY. "A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635.
3. ———: ———. Total and permanent disability, within the meaning of the workmen's compensation law, is that disability which is deemed total to do work of any reasonable character within the intendment of the law, when it appears that the employee, due to his physical injuries, is unable to perform work of the same or similar description as he is accustomed to perform, or is unable to obtain any substantial amount of labor in his particular line of work, or in any other for which he would be fitted except for the injury, and what little he may subsequently learn to do thereafter will be done under serious difficulties, placing him at an indubitable disadvantage in securing work that he may be able to perform.
4. **Evidence** in the record examined and *held* ample to support the finding and judgment of the district court.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, for appellants.

Alfred D. Raun, contra.

Heard before ROSE, C. J., EBERLY, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an appeal from the district court for Thurston

county, wherein the court, affirming the compensation court, found for James K. Ludwickson, the plaintiff, fixing the amount of his disability as total and permanent, within the meaning of the workmen's compensation law, for the reason that, solely because of said injuries, he is unable to perform any substantial amount of labor, either in his particular line of work or any other for which he would be fitted except for the injuries that he received in said accident. The court granted compensation at the rate of $13.07 each week for a period of 300 weeks from and after the 30th day of June, 1935, and thereafter the sum of $8.82 each week for the remainder of plaintiff's natural lifetime, less the amount of $1,725.24, which has been paid by defendants to the plaintiff. Defendants appeal from the judgment and decree.

There is no controversy relative to the occurrence of the accident by which plaintiff was injured; nor is there a denial that plaintiff was injured in the course of his employment. Stipulation of the parties discloses the payment of compensation as above set out, together with medical expenses, and it is agreed that plaintiff's wages at the time of the accident were $19.60 a week.

Plaintiff was a graduate of high school, Junior college, and the University of Nebraska, with an A. B. degree in mechanical engineering. At the time of the accident he was 25 years of age. He went to work for the defendant company September 17, 1933, as a Diesel engine operator. The injury to the plaintiff occurred June 30, 1935, when some 6,600 volts of electricity passed through and over his body. Plaintiff worked alone, and was on duty approximately eight hours a day, seven days a week, at the time of the accident, and was in charge of defendant's plant at Walthill, Nebraska, which served several towns and the rural community.

Dr. G. W. Briggs, a Walthill physician, was called immediately and found plaintiff lying on the floor of the substation of the plant in a coma, his pulse imperceptible, and saliva coming from his mouth. Doctor Briggs testified that

plaintiff had third degree burns on his chest and abdomen, on the back and left thigh, and on his left arm and hand; that the flesh was cooked; that the bones in his hands were visible; that the area of the burns on his chest and abdomen "extends diagonally across from the anterior part of the ilium, hip bone, up to the neck, and over to the back side of the sternum, the breastbone," taking in most of the chest on the left; that the burn on his chest and the front part of his body extended approximately from the point of his hip upwards, including practically all of the left side of his chest and going over to the right side of the breastbone, angled down to a point at the hip; destroyed all or part of the left pectoralis major muscle; that the burn on the back covered an area of eight by ten inches, mostly on the left side; extended over the backbone or spine a little; that the burn on the thigh was "almost as wide as the one on his back, practically eight by ten" inches, on the outer aspect of his left thigh; that the burn on the left arm or hand extended up to within four and a half or five inches of the elbow joint; "there was a burn at the anterior cubital fossa, the anterior aspect of the elbow;" the inner part; two burns under the armpit; clothing was charred, some of it burned off. Doctor Gramlich, the family physician, arrived, and subsequently the plaintiff was removed to a hospital in Walthill, and later to a hospital in Sioux City, Iowa. The witness further testified that plaintiff also had third degree burns on his feet; "the scar on the left foot is at the base, is on the sole of the foot below the first toe, that is the small toe. The one on the right foot runs from below the second toe longitudinally with the sole of the foot," back of the toes. The evidence further discloses that the left hand and wrist and forearm had been amputated four and one-half inches below the elbow joint, and on the left upper arm there was a scar on the anterior cubital fossa about three by four or possibly five inches; the condition of the remaining portion of the stump "is atrophied to a certain extent, and there is a scar on the stump;" plaintiff has limited motion of the stump, "due to the scar on the

tendon of the biceps muscle, and also to atrophy of that muscle." The doctors who testified found substantially the same scars and burned areas as testified to by Doctor Briggs.

The plaintiff followed the occupation of a Diesel engine operator. There were many duties to be performed in the course of his employment which necessitated, without question, the use of two hands, especially in starting the engines and in the use of heavy wrenches, weighing from 25 to 150 pounds. Some of the duties of a Diesel operator, as enumerated by the witness Dingwall, chief engineer of the defendant company, may be summarized as follows: In the plant in which plaintiff was employed were three engines, one 360, one 240, and one 100 horsepower, and the capacity of the plant was 700 horsepower, developing 460 kilowatts that generated 2,300 kilowatts, and stepped up in the substation to 6,600 kilowatts. In order to start the Fairbanks-Morse and Diesel engines, it was necessary to go into the basement, "turn the air on and then turn the water valves open and let the water circulate through the engines. * * * Hold the governor down with one hand and raise the air valve with the other to start it rolling over. And after it gets rolling it will start firing itself." This operation takes two hands. Due to plaintiff's injuries, he could not start the engine, for the reason that one hand is necessary to regulate the valve and one to regulate the governor. To "spot the engine" before starting it, it is necessary to use a big bar, place it in a hole in the flywheel to pull the engine over. The weight of the bar is about 40 pounds, and the length five feet, and the hole through which the bar is inserted is approximately five feet from the ground. The witness testified that a man could not perform this task with one hand; that salt is used in the softening of the water and is kept in the basement in 100-pound bags; that a man having only one hand would not be able to handle the bags and put the salt into the softener; that while the engines are being operated they require adjustments from time to time, and the plaintiff would be unable to make an

adjustment on the oil or fuel pump, for the reason that it necessitates the use of two hands; that two wrenches are required which must be operated simultaneously. As a Diesel operator the plaintiff would be required to make frequent inspections of the engines, necessitating adjustments of the fuel pump, or the engines would be ruined. Among plaintiff's duties was that of taking out the pistons and rings, which require removal of the cylinder head and plates from the side of the engine being repaired. The cylinder head is located about ten feet above the floor, and the side plates are in front as one stands up to it. The cylinder heads weigh 250 pounds and are taken off with hoists, and require the use of 25-pound wrenches. An extension of the wrench is used to tighten and loosen the nuts, the extension consisting of two-inch pipe, about four feet long. Work must also be done by the operator at times on the manifold, which consists of taking off the heads of the manifold at one end and cleaning out the carbon, reaching back the full length of the engine, which requires the use of both hands in taking the plate off. The pistons in the large engine are 15¼, in the middle engine 12¼, and in the Fairbanks 14 inches in diameter. It would be impossible for a man with one arm to remove the pistons. At times the fuel nozzles on the injection valves have to be cleaned and the valves ground, which requires the use of two hands. A Diesel operator is on his feet 80 to 90 per cent. of the time while on duty. The engine repair work is done off the floor. The engines are taken down and overhauled every three months. The water jacket is taken off at the same time. The fuel valves of the engine are ground every two weeks, requiring the use of two hands. The witness further testified that the plaintiff was disabled 100 per cent. as a Diesel operator, and that, as chief engineer in charge of the plant, he would not employ the plaintiff in his present condition.

The doctors testifying for defendants placed the permanent disability of plaintiff, taking into consideration all of the injured members of his body, at the rate of 75 per cent.

industrial disability and as a Diesel operator; while the physicians testifying for plaintiff placed his permanent disability at 100 per cent. This is the only conflict in the testimony given by the doctors. Suffice it to say that the doctors testified as to the scars and burned areas substantially as did Doctor Briggs. We therefore refrain from further extending this opinion by setting out the testimony of such witnesses.

The evidence further discloses that prior to the accident plaintiff was in excellent health, slept soundly at night and did not roll and toss in his sleep, while subsequent thereto he rolls and tosses in his sleep; that, in fact, it is dangerous for one to sleep in the same bed with him; that since the accident his body is subject to a quivering sensation and shivering when subjected to a change in temperature; that he is restless and complains of distress after eating.

The plaintiff had seven skin-grafting operations, the skin being taken from his thighs, covering an area 16 by 12 inches. The evidence shows that his clothes irritate his body and that he cannot bring his artificial arm closer to his mouth than seven and a half inches, and cannot lift anything of consequence with his left arm; that the scar on his lower abdomen is painful, and that the scars on his body produce a continual itching sensation, which makes him nervous and ill at ease under almost any circumstances; that he is conscious of the scars on his feet, even when he has his feet off the floor; that his feet are irritated and uncomfortable, and that he makes an effort to stay off his feet as much as possible. The burns on plaintiff's feet were near the transverse arch, and the nerve tissue was injured, as well as other structures in that area. There is limitation of motion in plaintiff's trunk, due to the burned area on his body. While such limitation is apparently slight, it is none the less annoying and irritating. There is considerable soreness and tenderness over the stump of the left arm and in the left elbow. Analyzing the evidence, it is obvious that plaintiff is under a continuous nervous strain.

In September, 1936, plaintiff enrolled at the University

of Nebraska, attending the university as a student to obtain his master's degree in mechanical engineering. He receives wages in the amount of $40 a month as a graduate assistant. He experiments with a miniature Diesel engine of 5 horsepower. He is at the university eight hours a day, six days a week, and on certain afternoons he is on his feet for four hours at a time while experimenting. There is also evidence that the plaintiff had washed and polished his automobile on occasions and that on the day of the trial he had driven his car to Pender. The appellants contend that the evidence is insufficient to support the finding and judgment of the trial court.

The case of *Wingate v. Evans Model Laundry,* 123 Neb. 844, 244 N. W. 635, is cited by both the appellants and the appellee. In that case it was held: "A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law."

The appellants contend that plaintiff was fitted for the work which he is now doing as a graduate assistant in the university, and that such is a substantial amount of employment, within the meaning of the holding in the *Wingate* case. It must be remembered that the plaintiff had equipped himself as a Diesel engine operator. He was a mechanical engineer, which implies that he had the ability, the technique and qualifications to handle the mechanics of an engine, and had sufficient training as an operator in a Diesel plant.

While we respect the testimony of the doctors as to the degree of disability of plaintiff, we must couple such testimony with that of an expert in the line of work for which plaintiff was fitted, as to whether or not he could substantially perform such labor. The evidence shows that for industrial purposes, in his own line of work and for manual labor he is totally and permanently disabled at least 75 per cent., and some of the experts testified that he was 100 per cent. disabled. His present occupation, if it may be called

such, is that of a graduate assistant, while he is making an effort to rehabilitate himself. Whether or not he could obtain such employment, in the absence of becoming a candidate for his master's degree, is not shown by the record and is purely speculative and conjectural. Should he obtain his master's degree, his employment in the future is also speculative and conjectural. Considering the evidence in its entirety, we believe that the holding in *Wingate v. Evans Model Laundry, supra,* does apply.

"It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797." *Wilson v. Brown-McDonald Co.,* 134 Neb. 211, 278 N. W. 254.

The trial judge was in a vastly better position than is this court to determine the weight to be given the testimony of the medical experts. He had the opportunity to observe the demeanor of the witnesses while testifying, and was better able to judge of their fairness and credibility than is this court from the record. In fact, the trial judge had a superior opportunity to thoroughly ascertain the facts. In addition, he had the opportunity to, and did, view the scars and burned area on the plaintiff's body, and from his examination of all the evidence, he concluded that plaintiff had a total and permanent disability.

In *Nebraska National Guard v. Morgan,* 112 Neb. 432, 199 N. W. 557, this court permitted recovery for total and permanent disability where the direct result of the injuries sustained by the employee was a fracture of the surgical neck of the femur in his left hip, and where the injury left broken ends of bone in the hip, resulting in misplacement of the hip, and causing irritation of the nerves coming into the hip, and affecting his whole physical and nervous system, in such manner as to totally disable the claimant from doing any work. We have in the case at bar a situation of the same nature, where the whole physical and nervous system of the plaintiff is affected by the numerous burns

sustained over different parts of his body, as above set out.

Total and permanent disability, within the meaning of the workmen's compensation law, is that disability which is deemed total to do work of any reasonable character within the intendment of the law, when it appears that the employee, due to his physical injuries, is unable to perform work of the same or similar description as he is accustomed to perform, or is unable to obtain any substantial amount of labor in his particular line of work, or in any other for which he would be fitted except for the injury, and what little he may subsequently learn to do thereafter will be done under serious difficulties, placing him at an indubitable disadvantage in securing work that he may be able to perform. The disability suffered by the plaintiff in the case at bar follows the conception of total and permanent disability, as herein stated.

In compliance with the provisions of section 48-125, Comp. St. Supp. 1937, the attorney for appellee is allowed the sum of $150 as fee for services in this court.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

J. H. MELVILLE LUMBER COMPANY, APPELLANT, V. LEON SCOTT, APPELLEE.

281 N. W. 803

FILED OCTOBER 21, 1938. No. 30413.

1. **Bills and Notes.** "Payee in a note payable on demand after date with interest may bring an action thereon the day after the note is executed and delivered." *Luikart v. Hoganson, ante,* p. 280, 281 N. W. 27.
2. **Limitation of Actions.** "Ordinarily the statute of limitations begins to run when a cause of action accrues." *Luikart v. Hoganson, ante,* p. 280, 281 N. W. 27.
3. ———. "By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations." *Luikart v. Hoganson, ante,* p. 280, 281 N. W. 27.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Frank Kelly and *J. Ernest Deming,* for appellant.

Schaper & Runyan, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

Plaintiff sued defendant in the county court of Custer county June 16, 1937, on a 149-dollar promissory note dated March 17, 1932. Defendant assailed the petition by demurrer on the ground it showed on its face that the action was barred by the five-year statute of limitations. Comp. St. 1929, sec. 20-205. The demurrer was sustained. Plaintiff, payee named in the note, stood upon the petition and refused to plead further. The county court entered a dismissal which was reviewed in the district court and affirmed. From the affirmance, plaintiff appealed to the supreme court.

The note was payable "On demand, after date, * * * with interest." The petition contains the plea "That no demand was made for the payment of said note until June 11, 1936," a date less than five years from the commencement of the action, June 16, 1937. The position of plaintiff is that a cause of action on the note did not accrue prior to the demand and that therefore the petition shows on its face that the claim is not outlawed. This view of the law is at variance with the following rulings announced in a recent case:

"Payee in a note payable on demand after date with interest may bring an action thereon the date after the note is executed and delivered. * * *

"Ordinarily the statute of limitations begins to run when a cause of action accrues." *Luikart v. Hoganson, ante,* p. 280, 281 N. W. 27.

"By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations." *Luikart v. Hoganson, ante,* p. 280, 281 N. W. 27.

AFFIRMED.

MARTIN J. GALLAGHER, APPELLANT, V. BEN LAW ET AL., APPELLEES.

281 N. W. 806

FILED OCTOBER 21, 1938. No. 30400.

1. **Evidence** in the record examined, and *held* ample to support the verdict of the jury and the judgment entered thereon.
2. **Trial:** INSTRUCTIONS. Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.
3. ———: ———. "It is not error for the trial court to refuse to define the words 'gross' and 'slight' in an instruction, since they are words of common use, readily understood by people of ordinary intelligence." *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N. W. 623.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Brown, Fitch & West, for appellant.

Wear, Boland & Nye, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an action at law for personal injuries sustained by plaintiff Gallagher, which are alleged to have been inflicted by R. D. Piatt, who was at the time employed by Ben Law. Plaintiff was at this time in the employment of the American Radiator Company, a corporation, which, in company with the Aetna Life Insurance Company, its compensation insurance carrier, were made parties to the action as provided by the terms of the Nebraska workmen's compensation law. Defendants Law and Piatt, by their amended answer, in addition to a general denial and a plea of contributory negligence on part of the plaintiff, specifically alleged, in substance, in reference to the accident, that defendant Piatt "had picked up a steel loading plate, or running board, and set the same on edge, and that the said

plaintiff was familiar with the nature, size and weight of said plate, and had placed his hands thereon for the purpose of holding said plate until the defendant Piatt changed the position of his truck in a doorway of said building," and that the plaintiff "negligently and carelessly permitted said plate to drop and come in contact with his leg," and inflict the injuries for which recovery is sought, and that defendant Piatt "had no part whatever in the dropping of said plate, but the same was negligently and carelessly dropped by the plaintiff himself." A trial of the issues thus formed to a jury resulted in a finding and judgment for the defendants. From the order of the trial court overruling his motion for a new trial, plaintiff appeals.

The record establishes the following facts, viz.: The American Radiator Company occupies a four-story building at 417 South Tenth street in Omaha, Nebraska. This is on the east side of the street between Howard and Harney streets. An alley runs along the north side of the shipping room of this building. The distance between the floor of this room and the surface of the alley is approximately 3½ to 4 feet. In November, 1935, plaintiff was making up radiators and shipping them out. The radiators were trucked by hand onto the elevator, brought to the main floor, and placed on the shipping floor. Automobile trucks backed up to the loading door leading to the alley. A metal "running board," an iron plate 4.7 feet long, 3 feet wide, weighing 150 pounds, was then laid from the floor of the trucks to the shipping room floor, over which the radiators were trucked and deposited in the conveyances employed. The loading doors are 9 feet wide. On November 29, 1935, plaintiff found Piatt's truck backed "catercorner" to the loading door and the "running board" in place lying with one end on the truck and the other end on the shipping room floor.

Plaintiff's evidence is: "Well, we walked over to the truck then, and I told him to square up his truck. * * * Q. Well, when you told him to square up his truck, about where were you standing there? A. I was standing in the

doorway, right on the edge of the sill. Q. And which way from this board or pan were you standing? A. West. * * * Q. And which way was he facing? A. Well, he was walking in then, until he turned around when I told him to get it in flush and I would truck them right down the center for him, and he said, 'All right.' He started raising the pan; when he started raising the pan, I says, 'I'll go get the elevator,' and I started walking away and he had the pan about waist-high; that is— * * * Q. Now, what happened? A. Well, I started for the elevator; I walked a little south and started east and all I know is 'bam!' and I was hit. Q. About how many steps had you taken from where you were standing here (indicating) until you were hit? A. Oh, I would say five to seven. * * * Q. Well, when this board or pan hit you, what happened to you? A. It knocked me down."

As to this same transaction, defendant Piatt's testimony is: "A. We walked over toward the truck. He told me I would have to square the truck up a little bit so that the plate would reach flush on both ends of the truck and the doorway. Q. Well, what did you say? A. I said, 'All right, I'll move it.' Q. And, then, what did you do? A. Well, I walked on the truck and lifted the end up that was in the truck and set it on end in the doorway. Q. Where was Mr. Gallagher then? A. He was standing right there. Q. When you say, 'right there,' what do you mean? A. In the doorway. Q. And when you lifted up the plate, where was Mr. Gallagher? A. Oh, approximately two feet inside the doorway. Q. All right, and what, if anything, did he do with reference to the plate when you picked it up? A. Well, nothing, when I picked it up. He put his hands on it after I had it standing on edge. Q. You set it up on end, did you? A. Yes, approximately like it is now (indicating exhibit 1). Q. Now, which hand did he put on the plate? A. He had both hands on it when I seen him. Q. Now, when the plate was standing in that position, with Gallagher with both hands on it in the doorway, what did you do? A. Well, I jumped down out of the doorway into the alley and started

along the right side of my truck to the cab to move it. Q. And when you did that, did you hear any movement of any kind in the building? A. No, sir. I was about—oh, five feet up alongside the body of the truck when I heard him holler, 'Help.' * * * Q. Then what did you do? A. Well, after I heard him holler, 'Help,' I went back up in the doorway and I seen him laying on the floor. Q. When was the last time that you saw the plate and before you heard Gallagher holler, 'Help'? A. Well, as I—the last I saw it, he had his hands on it as I turned to jump down out of the doorway. Q. And, then, when was the next time you saw it? A. Well, when I—after I had heard him holler, 'Help,' and I had went back inside. Q. Where was Mr. Gallagher at that time? A. Oh, he was laying approximately ten feet from the door. Q. And how was he lying? A. Oh, he was lying on his left side. Q. Did you see the plate drop on Mr. Gallagher? A. I did not. * * * Q. Now, can you tell us where the plate was and how it was lying? A. Well, the plate was lying—the north end of the plate approximately two foot from the doorway and the other was about—oh, six foot."

On rebuttal, plaintiff testified: "Q. Mr. Piatt has testified that when he up-ended it, you put both hands on the board. State whether or not you ever did? A. I never touched the board that morning, at all. If I had took hold, I wouldn't have taken hold of it like that."

As stated in their brief, appellees contend: "Under the testimony of plaintiff himself in this case, he was necessarily at least six feet from the south end of the plate after it had fallen to the floor. His testimony was that he took 'from 5 to 7 steps of ordinary length' in a southeasterly direction from a position directly on the sill and a foot or two west of the plate. This placed him inside the building—a distance of from 12 to 21 feet. The plate was 4.7 feet long and 3 feet wide. One end rested on the truck and one end was in the warehouse. The south end of the plate was about 1 foot inside the door of the warehouse. It was raised up to a vertical position and fell inward to the south. There is no evidence in the record that the plate

slipped at the time it was raised to a vertical position. Therefore, in falling, the plate did not extend more than 5.7 feet south from the door sill.

"These figures are based upon the undisputed evidence in the record. In addition to the physical impossibility of the plate having struck Gallagher at the place where he says he was when it fell, attention is called to the further fact that the plate struck the inside of his left ankle at a time when he was walking in a southeasterly direction from it—a position which would place the plate on his left side and slightly to the rear.

"We submit, accordingly, that the jury in this case was entirely correct in refusing to accept Gallagher's testimony as to how the accident happened. And we submit further that it is physically impossible for him to have been injured in the manner in which he claims the accident occurred."

From the entire record, without determining this contention urged by the appellees, it is quite obvious that the jury accepted as true the version of the affair as given by defendant Piatt, and on this point rejected the testimony of plaintiff Gallagher. On this question of conflicting evidence, the verdict of the jury is controlling.

The appellant contends that in instruction No. 6 the trial court ignored the rule of comparative negligence. However, in instruction No. 7, the rule of comparative negligence is fully stated by the court.

Further, appellant charges that in instruction No. 7 the trial court used the following language, "If upon such comparison you find the plaintiff's negligence slight and defendant's negligence gross, as those terms are defined in these instructions," and that while instruction No. 10 given by the court defines "ordinary care" and "negligence," the term "slight negligence" is not defined in any of the instructions given. This contention, we deem fully answered by the case of *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N. W. 623, wherein we announced the principle, viz.: "It is not error for the trial court to refuse to define the words 'gross' and 'slight' in an instruction, since they are

words of common use, readily understood by people of ordinary intelligence."

The last contention of appellant is that the trial court erred in submitting certain issues made by the pleadings that were established by the evidence without question, and in fact conceded. These instructions are not to be commended. However, considering the record, including the instructions, as an entirety, it is quite obvious that the substantial rights of appellant have not been adversely affected thereby. Even if it be deemed that technical error was committed, clearly it was error without prejudice, within the scope of section 20-853, Comp. St. 1929.

It follows that the judgment of the district court is, in all respects, correct, and it is

AFFIRMED.

EDWARD LAUX, APPELLEE, V. TELKO A. BATTERMAN, APPELLANT.

281 N. W. 799

FILED OCTOBER 21, 1938. No. 30401.

1. Appeal. "The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong." *Harrell v. People's City Mission Home*, 131 Neb. 138, 267 N. W. 344.
2. Instruction No. 5 given by the district court, under the issues made by the pleadings, in this case, examined and approved.

APPEAL from the district court for Morrill county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Neighbors & Coulter, for appellant.

C. G. Perry and *F. E. Williams, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

In this action, plaintiff alleged, in substance, that on De-

cember 11, 1934, defendant Batterman promised and agreed to loan to plaintiff $900; in consideration of which, plaintiff executed and delivered to defendant his promissory note for that amount, secured by a real estate mortgage. Plaintiff further alleged that it was also agreed that this loan should be paid to plaintiff in two instalments, as follows: $300 in cash, and the balance of $600 should be paid to plaintiff within one week thereafter; that the $600 was never paid to plaintiff by defendant, but the latter thereafter sold and negotiated the note and mortgage securing the same to a third person; that plaintiff was compelled to and did pay the third person the sum of $900 and interest thereon. Plaintiff brought this action to recover the $600 and interest, forming a part of the consideration of the $900 note which he never received, but was compelled to pay.

In his answer, defendant, in addition to a general denial, admitted the execution and delivery of the $900 note and mortgage by plaintiff to defendant, and that defendant paid plaintiff but $300 cash thereon; and further alleged that at the same time plaintiff was indebted to defendant in the sum of $619, and that, at the time of the making and delivery by plaintiff of the note of $900 and the real estate mortgage securing the same, "it was then agreed between said parties that the plaintiff should give the defendant his note for the sum of $900 and secure the same by a real estate mortgage, and the defendant would accept said note and mortgage in full settlement of said indebtedness," and as evidencing the $300 advanced by defendant to plaintiff at the time of the agreement to make the $900 loan. This plaintiff, by his reply, denied.

On trial to a jury, the verdict returned was in favor of plaintiff, fixing the amount of his recovery at "$600, plus interest," upon which judgment was entered by the trial court in favor of plaintiff and against defendant for "the sum of $600, and his costs." From the overruling of his motion for a new trial, the defendant appeals.

In his brief, appellant challenges the judgment appealed

from because of the alleged insufficiency of the evidence. The bill of exceptions discloses that plaintiff below testified positively that the purpose of the $900 loan was the purchase of the ranch on which he resided. The defendant below testified that the transaction involved the advance of but $300 in cash, and the securing by real estate mortgage of an additional sum of $600 then due from plaintiff to defendant. This evidence was positively denied by plaintiff, who also challenged the correctness and *bona fides* of the several items claimed by defendant as making up the $600 indebtedness. Without detailing the evidence which entered into the subject of previous and contemporaneous transactions between the parties, it may be said that it was thoroughly conflicting, and presented a strictly jury question. The jurors heard the evidence, observed the witnesses, and the testimony adduced by plaintiff (though denied by defendant), if believed, amply sustains their verdict. In this condition of the record, all questions of preponderance of the evidence are for the sole determination of the trial jury.

The controlling principle is, viz.: "The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong." *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344.

Appellant challenges the correctness of the fifth instruction given by the trial court on its own motion, for the reason that "there was a presumption of consideration in favor of the note in question, which presumption the appellee was required to overcome by preponderance of the evidence," and failure to instruct the jury on this point constitutes reversible error. It is to be noted that no instructions on this point were requested by defendant at the time of trial. In instruction No. 5, the trial court said, in part:

"That the burden of proof is upon the plaintiff, * * * and that the material allegations upon which he relies for a recovery in this case must be proved by him by a preponderance of the evidence; that said material allegations are: * * * 2. That as consideration for said note and mortgage,

the plaintiff was to receive from defendant the sum of $900, as alleged in plaintiff's petition. 3. That as consideration for said note and mortgage, the plaintiff received from defendant only the sum of $300. 4. That said note and mortgage dated December 11, 1934, in the principal sum of $900, has by the plaintiff been fully paid."

It is obvious that the instructions as given by the trial court fully state the law of this state on the point here raised, as determined in *Plaza Hotel Co. v. Hotel Stratton,* 132 Neb. 396, 272 N. W. 224.

As to the objection to the exclusion of defendant's testimony contained in his offer of proof, the record discloses that the question referred to in appellant's brief, and in reference to which his offer of evidence was made, arose on cross-examination. In this state, the established practice contemplates no offer of proof on cross-examination. *Powell v. Morrill,* 83 Neb. 119, 119 N. W. 9; *Larson v. Hafer,* 105 Neb. 257, 179 N. W. 1013.

The sole question which might have arisen was whether the ruling of the trial court on the question preceding the offer of proof amounted to a denial of the right of cross-examination. As this question was not presented and argued in appellant's brief, it will not be here considered.

It follows, therefore, that the record here presented supports the judgment of the trial court, and the same is

AFFIRMED.

EARL TURPIN, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

281 N. W. 800

FILED OCTOBER 21, 1938. No. 30510.

1. **Evidence.** "Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence." 8 R. C. L. 638, sec. 180.
2. ———. A physician who has examined the person injured for the purpose of qualifying himself to testify at a trial may testify to statements of such person during the examination as

to subjective symptoms, to show upon what information the physician based his opinion.

3. ———. The trial court was at a distinct advantage over this court in being able to see the movement or lack of movement in the injured wrist, and while observing the several doctors testify he could note whether their testimony was prompt, positive, definite, and carried conviction, or whether it was halting, evasive, and rather uncertain.

APPEAL from the district court for Jefferson county: CLOYD B. ELLIS, JUDGE. *Affirmed.*

Richard C. Hunter, Attorney General, and *Harry S. Grimminger,* for appellant.

Hubka & Hubka, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

Earl Turpin, the plaintiff, suffered a broken bone in his right hand while operating a tractor for the department of roads and irrigation of the state of Nebraska. An award was made in the compensation court, from which the plaintiff appealed, and a larger award was granted in the district court, directing payment of $15 a week for a period of 87½ weeks. The state appealed.

The transcript in this case shows that the case was filed before the workmen's compensation court in February, 1938, and was heard before one member of said court at Fairbury, Jefferson county, on April 1, 1938. The report and award show that the plaintiff, while in the employ of the state of Nebraska on June 18, 1937, suffered the accident when the shift lever kicked back, striking him in the palm of the hand near the wrist, causing a fracture of the right carpal scaphoid bone. He was totally disabled from the 18th of June, 1937, to the 19th day of January, 1938, a period of 30 5/7 weeks, at which time all temporary total disability ceased. In addition, he was to receive $15 a week for a period of 35 weeks from January 19, 1938, for com-

pensation for a 20 per cent. permanent partial disability of his right hand.

Plaintiff thereupon filed a waiver of a hearing before the full compensation court, and elected to appeal directly to the district court, filing a petition therein on May 14, 1938, in which he sets out the facts and asks that the award be vacated and that a finding be made of total temporary disability of at least 50 per cent. and all medical expenses.

In its answer in the district court, defendant alleged that it had paid $460.71 for 30 5/7 weeks, and in addition had paid hospital and medical bills in the sum of $172.05, and complains that the award made was excessive and not supported by the evidence, and asks that the petition be dismissed.

Trial was had before the district judge on June 21, 1938. The court found in favor of plaintiff, and that plaintiff had sustained a permanent partial loss of the use of his right hand to the extent of 50 per cent. of the use of said hand, and that plaintiff is entitled to compensation therefor at the rate of $15 a week for a period of 87½ weeks, commencing on January 19, 1938, in addition to payments already received.

The principal question is, how much disability did the employee suffer as a result of this accident? He was first treated by Dr. Lynch at Fairbury. Later he came to Lincoln, because the fragments had failed to unite, and plaintiff could not straighten his wrist. Many X-rays were taken. An open operation was performed by Dr. Orr, the fibrous tissue was removed from between the fragments of bone, and a peg or pin was cut from the radius bone in the arm, and with that peg the two pieces were pinned tightly together.

This operation by Dr. Orr took place November 19, and the cast was removed December 7, and splints applied. In February plaintiff was again examined by Dr. Orr, and said he was unable to use his hand for tractor work, and complained of pain in the wrist.

Dr. Orr testified that the disability of this wrist was

about 17 per cent. to 20 per cent. in one motion and 30 per cent. to 40 per cent. in another motion, and testified that a union had been obtained between the fragments of bone.

The testimony of the doctors called by the plaintiff ran as follows: Dr. Rush testified that the disability was 70 per cent. to 80 per cent., and was not sure whether a union had been obtained. Dr. Noble testified there was no union, and that there was inflammation, and the disability was about 70 per cent. Dr. Wildhaber had no opinion as to whether a union had been obtained, and testified that the disability was about 50 per cent. to 60 per cent.

It will thus be seen that the medical testimony in this case agrees generally in regard to the injury suffered by the plaintiff and the treatment given. It disagrees as to the amount of disability existing at the time of trial in the right wrist of the plaintiff. It also disagrees as to whether there has been a union of the two pieces into which the bone was fractured, and as to whether there is inflammation and pain present.

It was argued by the state in its brief that "one important part of this testimony does not appear in the record, and that is the demonstrations that the plaintiff in the action made on numerous occasions before the court." Again, that "where the determining factor in the case is a subjective symptom of the claimant himself, particularly relative to pain, and the amount of grip," the court should consider such evidence very carefully.

In bone fractures it is not unusual that inflammation and pain follow, especially when open surgical methods have been necessary to unite the fractured portions. An injured man is often prevented from performing his accustomed tasks by pain caused by pressure, even when an X-ray picture may show a perfect union of the bone, and a medical expert may indicate that in his opinion the pain may be exaggerated. Plaintiff testifies that he cannot milk a cow, or pitch hay; that it seems as if there was something between the bones, and he does not have any grip, and that it is sore most of the time.

"Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence." 8 R. C. L. 638, sec. 180.

"A physician who examined the plaintiff in a personal injury action for the purpose of qualifying himself to testify at the trial may testify to statements of such person during the examination as to subjective symptoms, to show upon what information the physician based his opinion." *Kraettli v. North Coast Transportation Co.*, 80 A. L. R. 1520 (166 Wash. 186, 6 Pac. (2d) 609). See *Reid v. Yellow Cab Co.*, 131 Or. 27, 279 Pac. 635, 67 A. L. R. 1.

An examination of the evidence leads us to the conclusion that his testimony is supported by that of others on practically every point, and the evidence of the work that he has tried to do, and failed because of a lack of grip in this hand, would support his testimony that he does suffer pain. The court was at a distinct advantage over this court in being able to see the movement or lack of movement in the injured wrist, and while observing the several doctors testify he could note whether their testimony was prompt, positive, definite, and carried conviction, or whether it was halting, evasive, and rather uncertain. There is no question but that the testimony is conflicting, and in such a case the conclusions reached by the trial court are not only entitled to careful consideration, but the judgment should not be reversed unless good cause is shown in the evidence set forth in the bill of exceptions, or in the law as applicable to the facts in the case.

In chapter 57, Laws 1935, the legislature, in providing for a new compensation court, set out the procedure to be followed in such cases in great detail. This act, as now found in section 48-174, Comp. St. Supp. 1937, provides that a judgment or award of the compensation court can only be set aside on four grounds, and that this court may only modify or set aside the order of the district court on four grounds, of which the third reads: "That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be

considered *de novo* upon the record." And the fourth reads: "That the findings of fact by the court do not support the order or award."

In our opinion, the plaintiff has established his case by a preponderance of the evidence under the law just quoted. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655; *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702, 164 N. W. 708; *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706, 178 N. W. 639; *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772; *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178.

There being no prejudicial error in the findings of fact and the award thereon, the judgment of the trial court is hereby affirmed and the plaintiff allowed an attorney's fee in this court in the sum of $100.

AFFIRMED.

PAUL HORBACH, APPELLEE, V. DAN B. BUTLER ET AL., APPELLANTS.
281 N. W. 804

FILED OCTOBER 21, 1938. NO. 30338.

1. **Appeal.** An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the supreme court.
2. **Municipal Corporations: POWERS: NUISANCES.** A city of the metropolitan class has the power to remove or order the removal of a dangerous building which has become a nuisance because of its condition.
3. ———: ———. If the exercise of a power granted to a municipal corporation is within the limitations of the legislative grant and its exercise by the governing authority is based upon evidence sufficient to sustain it, the conclusion thus reached is final and the courts are without authority to interfere.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed and dismissed.*

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand and *Louis T. Carnazzo*, for appellants.

D. M. Murphy, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is a suit in equity in which plaintiff seeks an injunction restraining the city of Omaha, its officers and servants, from tearing down a building condemned by the city council. The trial court granted the injunction as prayed, and the city of Omaha appeals.

Plaintiff alleged in his petition that he was the owner of the property in question, that it was substantially built and in no danger of falling down and that it constituted neither a public nor private nuisance. He further alleged that the city council of the city of Omaha had ordered the building condemned, that he intended to appeal from the condemnation order and that he had no adequate remedy except by injunction.

In its answer the city pleaded the ordinance under which the condemnation order was procured, the report of the building inspector, alleged the service of notice on plaintiff and his appearance at the hearing, and the entry of the condemnation order after the taking of evidence. The city also alleged that plaintiff failed to comply with the order and prayed for the denial of the injunction. No reply was filed.

It appears from the record that the regularity of the proceedings before the city council was not questioned until the appeal was lodged in this court. Plaintiff's petition does not raise this issue and no evidence was offered to support any such claim. The city did allege in its answer the service of notice and the appearance of plaintiff at the hearing. This allegation was not denied and the case was not tried on the theory that the proceedings before the city council were irregular. Under this situation, plaintiff cannot now, for the first time, inject that issue into the case in this court.

The issue tried was whether the building on plaintiff's

lots was in such condition as to constitute a nuisance. The findings of the trial court were solely that the building did not constitute a nuisance and that an injunction should be granted. The correctness of this ruling is the only question remaining for consideration.

Plaintiff offered evidence to the effect that the building was not in such shape that it would constitute a nuisance although it was conceded to be in poor condition. The defendant city likewise offered the testimony of the building inspector and other experts to the effect that the building was in a dangerous condition and constituted a public nuisance. Without discussing the evidence in detail, we come to the conclusion that the evidence offered by the city was sufficient to sustain a finding that the building did constitute a nuisance.

That the city of Omaha has the power to remove, or order the removal of, a dangerous building which constitutes a nuisance is not disputed. The city council likewise may exercise executive, legislative and judicial powers. Comp. St. 1929, sec. 14-214. The courts do not ordinarily interfere with or control the exercise of such discretionary powers, whether such powers are executive, legislative or judicial in their nature, except in clear cases of abuse. If the exercise of the power was within the limitations of its grant and the city council have not abused their exercise of the power, a court will ordinarily decline to substitute its judgment for that of the city council. The foregoing is sustained by the following authorities: *Village of Bellevue v. Bellevue Improvement* Co., 65 Neb. 52, 90 N. W. 1002; *Enders v. Friday*, 78 Neb. 510, 111 N. W. 140; *Whitla v. Connor*, 114 Neb. 526, 208 N. W. 670; 43 C. J. 304.

In the case at bar, a hearing was held and evidence taken by the city council to determine whether or not the building constituted a nuisance. As we have heretofore stated, the evidence thus produced was sufficient to sustain the finding of the city council that the building was a public nuisance. Under such circumstances, the courts are without authority to substitute their judgment for that of the city council.

In *In re Wickstrum*, 92 Neb. 523, 138 N. W. 733, we said: "The principles controlling the question presented are so well settled in this state as scarcely to require repetition: 'Courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature.'" In *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, we said: "While a city, having authority 'to define, regulate, suppress and prevent nuisances,' cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police powers may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances."

The city council having acted within the limits of the power granted to them by the legislature, and there being sufficient evidence before the city council to sustain a finding that plaintiff's building constituted a public nuisance, the trial court was in error in granting an injunction. In the absence of a showing that the city council acted outside of their granted powers, or of a showing that they abused the discretion lodged with them, in the exercise of a granted power, the finding of the city council is conclusive. The judgment of the district court will therefore be reversed and the petition dismissed.

REVERSED AND DISMISSED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT, V. CARL R. ANDERSON ET AL., APPELLEES.
281 N. W. 796

FILED OCTOBER 21, 1938. No. 30376.

1. **Evidence.** "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672.
2. **Bills and Notes:** ACCOMMODATION MAKER. "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the

transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Lee v. Hildebrand*, 119 Neb. 717, 230 N. W. 673.

3. ———: ———. "An accommodation maker of a promissory note is not liable to the party accommodated." *Empson v. Richter*, 113 Neb. 706, 204 N. W. 518.

APPEAL from the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Waring & Waring, for appellant.

August C. Krebs and *R. A. Boehmer, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

On December 1, 1937, the district court for Clay county entered an order on a hearing upon the application of the plaintiff for a deficiency judgment and objections thereto filed by Carl R. Anderson and Mabel O. Anderson, defendants. The court found that no liability existed on the part of the defendants Anderson, or either of them, for a deficiency judgment, and denied and dismissed the application, to which plaintiff excepted. The court overruled the motion for a new trial, and plaintiff appeals to this court.

All of the proceedings relative to the foreclosure of the mortgage as against defendants in this action, the confirmation of the sale, and the application for a deficiency judgment in the sum of $5,326.40, have been examined and found regular in form. The pertinent facts in this case may be summarized as follows:

On February 8, 1931, defendants Carl R. and Mabel O. Anderson, Rose Ruby Wells and William R. Wells executed several notes, totaling $9,000, the mortgage being executed at the same time. Before these notes and mortgage were signed, Carl R. Anderson held title to 155 acres of land in Clay county, subject to a mortgage of $9,500, due the plaintiff, and made application for a renewal of that mortgage by paying $500 on the 9,500-dollar notes, and adding 12 acres

of land as additional security for the new mortgage. In January, 1931, while such application was pending and before the notes were signed, the land covered by the mortgage was traded to Rose Ruby Wells, who assumed and agreed to pay the mortgage of $9,000. This trade involved the transfer of 167 acres of land, subject to the 9,000-dollar mortgage, for 80 acres of land, free of encumbrance, to go to defendant Carl R. Anderson. The deed was not signed or recorded until some time after the date of the mortgage, Rose Ruby Wells obtaining the deed on March 12, 1931. The coupon notes on the mortgage were not signed by defendants Anderson, but Rose Ruby and William R. Wells signed the notes with the Andersons. Rose and William Wells agreed to take over the application of Anderson; the agent for the Lincoln Trust Company suggesting this procedure. The reason for so doing was to save the expense of a new publication, and a commission of $135 was paid by Wells. The plaintiff in this action is successor-trustee of the original mortgagee.

The principal question raised in this appeal is whether or not oral testimony of an agreement, had between defendants Anderson and the agent of the original mortgagee at the time of the execution of the promissory notes, was admissible in evidence, or whether such oral testimony was an attempt on the part of defendants Anderson to vary and contradict the terms of a written instrument. The court admitted the oral testimony, which is shown by the evidence as follows:

Carl R. Anderson, in answer to question 26, stated: "He said it would be all right for us to sign those and they would hold Mr. Wells and Rose Ruby Wells as the parties to pay this mortgage; that the security they had, they were satisfied with the security; and we would not be held responsible." The evidence of William R. Wells develops that when the interest became due on the note the time was extended by the Lincoln Trust Company, the extension agreement being signed by defendants Wells. The evidence does not show that defendants Anderson knew of the extension agreement.

The court propounded the following question to the witness William R. Wells: "Q. How did it come that you and your wife and Mr. Anderson and his wife all signed the note and mortgage? A. We talked to Mr. Anderson about that at the time and he said he had this signed up. We never dealt with him at all after this old mortgage was out. And at the time he made his application for a new mortgage they told him he would have to pay $500 off. The reason I happen to know this is because when we took it over he wanted us to pay the $500, and I said, 'No.' Why we dealt for the, the other mortgage, was because we objected to signing the coupons with their names on and the mortgage too. And he said we would save a lot of time by signing it that way and that he was under no obligation by leaving his or his wife's name on there. That's the way I got it. That's the way it was explained to me at the time; because we never took this loan over until—I imagine it was about a month after this loan was due and all the papers were all fixed all ready to send in for Mr. Anderson and we kept it because that was on another land deal up until a few days before this and this is what went through. Q. When it was done was it your understanding that this was a mortgage of your wife and yourself, that is, the debt, and not the debt of the Andersons? A. That's the way—that's the way they explained it to us. We didn't think because their names were on there that they were under any responsibility whatever." Plaintiff's counsel then resumed: "Q. This explanation you are talking about, when was that made? A. That was made when we signed the coupons. Q. When you signed these papers? A. Yes. Q. And at that time Anderson and his wife had already signed? A. I wouldn't say as to that, whether they signed then. We were all at the bank at the same time." The evidence further discloses that defendants Anderson received no notice from the plaintiff, or from the Lincoln Safe Deposit Company, or the Lincoln Trust Company, of any delinquency or any obligation under this mortgage.

The appellant contends that the notes signed by defend-

ants Anderson are a complete contract in themselves and cannot be varied by parol evidence, citing in support of such contention *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, 199 N. W. 802. In the latter case the defendants relied upon an alleged oral agreement, entered into between themselves and the president and cashier of the plaintiff bank, to the effect that the mother, one of the defendants, would not be called upon to pay the note; that it was to be used solely for the purpose of satisfying the demands of the bank examiner. It was said in the opinion (p. 498) : "The note is a complete contract in itself, and its terms cannot be varied or contradicted by extraneous parol evidence," citing cases; and further: "The fact is that no communication, oral or written, ever passed" between the president, or the cashier, or the bank "and the mother prior to her signing the new note, or in reference to it. * * * Furthermore," the cashier and president "could not bind the bank to such an agreement, which, if made by them, was clearly outside the scope of their authority."

A different situation arose in that case than in the case at bar, and the facts are not similar or analogous. In the instant case and cases of a similar nature, this court has admitted testimony to show the real purpose by which a promissory note was executed, when such note was sued on by the payee named in the note, and in the instant case the trust company stands in the same relation as the original payee by virtue of the bankruptcy proceedings of the original payee and the appointment of the First Trust Company as trustee to carry on the business of the bankrupt payee.

In *Davis v. Sterns,* 85 Neb. 121, 122 N. W. 672, this court held: "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." The above holding was followed and quoted in *Spangenberg v. Losey,* 116 Neb. 112, 216 N. W. 191, wherein other cases were cited which hold to like effect.

In the instant case defendants Anderson signed the notes on the promise and agreement of the agent of the plaintiff

that they would not be held responsible on said notes, and the notes were signed as an accommodation to the payee, to expedite the business, and to save the publication of a new loan.

The case of *Security Savings Bank v. Rhodes*, 107 Neb. 223, 185 N. W. 421, which appellant quotes in its brief, is distinguished. In that case the party agreeing to pay the note was not a signer of the note, and the payee was not a party to the oral agreement, as in the case at bar. We believe that the signatures of the Andersons on the notes in question constituted an accommodation, under the definition of "accommodation paper," and that the evidence clearly shows that this is not an obligation of Anderson; that the Lincoln Safe Deposit Company was a party to the transaction, and that it took place before the notes were signed; that it was understood and agreed that it was the obligation of Wells, who undertook to assume the mortgage and even signed the notes, to show his liability for the debt.

In *Lee v. Hildebrand*, 119 Neb. 717, 230 N. W. 673, we held: "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." Anderson was, under the facts in the instant case, an accommodation maker.

In the case of *Empson v. Richter*, 113 Neb. 706, 204 N. W. 518, it was held: "An accommodation maker of a promissory note is not liable to the party accommodated," which holding is followed in the case of *Willis v. Sponsler*, 117 Neb. 1, 219 N. W. 581.

Other propositions of law urged by appellant to obtain a reversal are not, in view of our holding, necessary to a determination of this case.

The order of the trial court denying a deficiency judgment against defendants Anderson is

AFFIRMED.

ROSE FILLEY, APPELLEE, V. SAMUEL MANCUSO ET AL., APPELLANTS.
281 N. W. 850

FILED OCTOBER 28, 1938. No. 30419.

1. **Mortgages: DEFICIENCY JUDGMENTS.** "The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision which permitted such a judgment." *Stowers v. Stuck*, 131 Neb. 409, 268 N. W. 310. See Comp. St. 1929, secs. 49-301, 20-2141.
2. **Husband and Wife.** Where husband and wife execute a note and also a mortgage on real estate to secure his debt without inserting in those instruments any provision binding the wife's separate estate, a deficiency judgment against her in a suit to foreclose the mortgage is unauthorized, if the undisputed evidence proves that she did not bind, or intend to bind, her separate estate or engage in any trade or business or perform services for hire.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed in part and reversed in part.*

Charles W. Haller, for appellants.

Beckman & Beckman, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

This suit was commenced to foreclose a 6,000-dollar mortgage on a residence lot fronting on Hanscom Park in the city of Omaha. Rose Filley is plaintiff and Samuel Mancuso and Mary Mancuso, his wife, are defendants.

April 20, 1935, the district court decreed foreclosure for unpaid debt and interest amounting to $8,607.74. The decree of foreclosure is not now reviewable.

Under the decree the sheriff sold the mortgaged premises January 11, 1938, to Frank L. Tedesco for $3,400.

On motions of plaintiff the sale was confirmed by the

district court January 22, 1938, and a deficiency judgment entered against both defendants for $5,207.74. From confirmation of the sale and from the deficiency judgment, defendants appealed.

On appeal the judicial sale is challenged as erroneous and invalid because, as argued, it was not made at the time and place designated in the published notice. The sheriff published legal notice that he would sell the mortgaged property at 10 o'clock a. m., Tuesday, January 11, 1938, at the east door of the Douglas county courthouse, to the highest bidder for cash. The trial court admitted affidavits in evidence on the motion to confirm the sale. They tended to prove that no one from the sheriff's office appeared at the proper place to make the sale at 10 o'clock a. m. In the same manner it was shown that a deputy sheriff appeared for that purpose 10 minutes later and that the sale was made within the hour between 10 and 11 o'clock the same forenoon. There was nothing to prove that any prospective bidder for this particular property left before it was offered for sale. The sheriff's return recited it was sold at the time and place stated in the published notice. The trial court found the sale was made according to law. The confirmation stated on sufficient evidence that the sale was made for a fair price and would not likely bring a better price at a resale. If, therefore, the sheriff was 10 minutes late at the place of the sale, defendants were not thus prejudiced or entitled to a reversal on account of the delay.

Defendants insist further that the deficiency judgment against them was unauthorized because the statute providing for relief of that kind was repealed in 1933, without a clause preserving rights created by the legislation repealed. Comp. St. Supp. 1935, sec. 20-2141. This position is untenable under a former ruling.

"The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision which permitted such a

judgment." *Stowers v. Stuck*, 131 Neb. 409, 268 N. W. 310. See *Helfrich v. Baxter*, 128 Neb. 281, 258 N. W. 532; Comp. St. 1929, secs. 49-301, 20-2141.

It is contended further that the deficiency judgment against Mary Mancuso, wife of the principal debtor, is erroneous and unauthorized because there is no evidence that she bound, or intended to bind, her separate estate when she signed the note and the mortgage. Neither instrument recites that she intended to do so. There is no evidence in the record to that effect. On the contrary, the evidence at the hearing on the motion for a deficiency judgment is uncontradicted and its import is that she did not bind, or intend to bind, her separate estate for her husband's debt, but signed the instruments according to custom to perfect a lien on the mortgaged property to secure his own debt; that the wife did not at the time of the transactions involved herein, nor since, engage in any trade or business or perform personal services for hire. In this view of the issue and the evidence, the deficiency judgment against the wife is without support in fact or law. *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82. The deficiency judgment against defendant Mary Mancuso is reversed and the motion therefor as to her overruled. In other respects the judgment below is affirmed at the costs of defendant Samuel Mancuso.

JUDGMENT ACCORDINGLY.

C. EDWIN SWAN, APPELLANT, V. JESSE SHERMAN BOWKER, APPELLEE.

281 N. W. 891

FILED OCTOBER 28, 1938. No. 30351.

1. **Elections:** CONTESTS: PROCEDURE. The proceedings for contesting an election provided for by the Nebraska statutes is, strictly speaking, neither an action at law nor a suit in equity. It is a summary proceeding of a political nature, and the terms of the statute are controlling as to all rights claimed thereunder.

2. ———: ———: ———. The proceedings therein shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to a right hearing and determination of the matter.
3. ———: ———: ———. Assimilating the procedure in this class of cases, the principles of procedure must be in harmony with the provisions of our Civil Code relating to proceedings under special statutes (Comp. St. 1929, sec. 20-2226), provided, however, the practice adopted must be consistent with the specific provisions of the special act under consideration.
4. ———: ———: ———. Statutes construed, and *held* that without reference to the state of the pleadings, in view of the facts of this record, the instant case did not stand for trial until May 21, or four days after the May term of the county court had closed. Further, there is no legal requirement that the contestee should file his answer during the May term of that court, and therefore no basis for the contention that he was in default in failing so to do.
5. ———: ———: ———. The provisions of this special enactment, in the light of the Code provisions applicable thereto, vest the trial tribunals proceeding thereunder with ample and complete powers of amendments of pleadings, to the same extent as those vested in courts of record.
6. ———: ———: ———. The allowance of an amendment in an appropriate case is not to be denied solely because the trial has progressed to a particular stage, and amendments may be allowed, in the exercise of proper discretion by the court, even after the evidence is closed.
7. ———: ———: ———. On appeal, actions under this special statute are heard *de novo* by the appellate court.
8. ———: ———: ———. The record in this cause, pertaining to amendments allowed in the district court, examined, and *held* that, in substance and effect, the same did not exceed in actual scope the amendment sought by the defendant in the county court, and the action of the district court in the allowance thereof is approved.
9. ———: ———. Record examined, and five voters named therein are found to be illegal voters, and two other voters, also challenged, are adjudged legal voters.
10. ———. "Persons otherwise qualified as voters who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies, who are accustomed

to leave the seat of the university during vacation, going wherever they might find employment, and returning to the university when the term opens, regarding the seat of the university as their home and having no purpose formed as to their movements after completing their studies, are entitled to vote at the seat of the university." *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249.

11. ———. "The requirements of the Australian ballot law, that the names or signatures of the two judges of an election shall be written on the back of each ballot to be used, and that a ballot not so indorsed shall be void, and not counted, are mandatory, and are not inimical to constitutional provisions." *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495.

12. ———. The nineteen ballots challenged as void by the respective parties examined, seven thereof rejected, nine thereof adjudged legal ballots and counted for contestant, and three thereof determined legal ballots and counted for contestee.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Dryden, Dryden & Jensen, for appellant.

Edward P. McDermott and *W. M. Cook, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an election contest under the provisions of article 10 of chapter 32 of the Compiled Statutes of Nebraska for 1929.

C. Edwin Swan contests the election of Jesse Sherman Bowker to the office of water commissioner of the city of Kearney, Nebraska, at its regular city election held on April 6, 1937. Originally tried in the county court, judgment was there for contestant. On appeal, the district court entered judgment in favor of contestee. The contestant now appeals to this court.

The statutory grounds upon which the contestant proceeds are: "Fifth. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result. Sixth. For any error in any board of canvassers in counting the votes, or in declaring the result of the election

if the error would change the result." Comp. St. 1929, sec. 32-1002.

The proceeding for contesting an election provided for by this statute is, strictly speaking, neither an action at law nor a suit in equity. It is a summary proceeding of a political nature. *Barnes v. City of Lincoln,* 85 Neb. 494, 124 N. W. 99.

The provisions of the statute involved, by its terms providing for a special proceeding, are therefore controlling as to all rights claimed thereunder. It expressly provides, however, that "The county court shall hear and determine contests of * * * officers of cities and incorporated villages within the county." Comp. St. 1929, sec. 32-1009.

It also provides: "The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter," together with other express powers conferred and specifically enumerated in the statute. Comp. St. 1929, sec. 32-1025.

Contestant complains of certain action taken by the county court. His petition of contest and bond were filed therein on April 21, 1937. Summons was issued, in terms requiring the incumbent to answer the complaint on the 3d day of May, 1937, and this summons, together with a certified copy of the petition, was served upon the defendant on the same day, to wit, April 21, 1937. On May 4 following the contestant filed a written motion for judgment by default. No action was taken by the court on this motion. On May 11, 1937, contestee filed a motion to make contestant's petition more definite and certain. On May 13, 1937, contestant filed a motion to strike this motion of contestee from the files, for the reason that contestee was in default, and that said motion was filed out of time without securing permission of the court. The county court sustained this motion, but permitted contestee to answer forthwith. The answer of contestee was filed May 17, 1937. Contestant on May 17, 1937, filed a motion to strike the answer

of contestee, for the reason that he was in default of answer and the court had no jurisdiction to allow an answer to be filed. The last motion of the contestant was in effect denied. These dispositions made of pleadings are challenged as erroneous.

Two answers may be made to the contentions outlined.

The statutory provisions applicable are, viz.:

"The rules of practice concerning pleadings and processes in the district court shall be applicable, so far as may be, to pleadings and proceedings in the county court." Comp. St. 1929, sec. 27-512.

"The court, or the judge thereof in vacation, for good cause shown, may extend the time for filing an answer or reply upon such terms as may be just." Comp. St. 1929, sec. 20-822.

Maxwell, J., in discussing this question, employed the following language:

"In such case the fact that the time to answer or reply has expired has never been held (in this state at least) to preclude the court or judge from extending the time in which to file such answer or reply; and, where the application is made in good faith, the fact that the party is in default will not deprive him of the right." *Greenwood v. Cobbey,* 24 Neb. 648, 39 N. W. 833.

But a complete answer to contestant's contention on this question is that the contestee, as shown by this record, has at no time been in default. This is not an action at law nor a suit in equity, and the procedure is only assimilated to those in an action. So, while section 32-1022, Comp. St. 1929, provides that, upon the filing of a complaint, "summons shall issue against the person whose office is contested, in the same manner as in civil actions," etc., section 32-1023 also provides: "The cause shall stand for trial at the expiration of thirty days from the time of service of the summons and complaint, if the court shall then be in session; otherwise on the first day of the next term thereafter."

Assimilating the procedure in this class of cases, the

principles of procedure must be in harmony with the provisions of our Civil Code relating to proceedings under special statutes (Comp. St. 1929, sec. 20-2226), provided, however, the practice adopted must be consistent with the specific provisions of the special act under consideration.

On this basis it will be noted that section 27-505, Comp. St. 1929, provides for monthly terms of the county court for actions not cognizable before a justice of the peace, commencing on the first Monday in each calendar month and continuing to the third Monday of such month, inclusive, when all cases not then finally determined shall be continued by such court to the next regular term. While the issuance of summons in county court cases is provided for by section 27-506, it does not empower the county court by the summons issued to definitely fix the answer day for the defendant. Section 27-513, provides: "And the defendant shall also, on or before the *first day of the term at which the case stands for trial,* file in such court his answer containing any set-off or other defense he may have." (Italics supplied.)

The May, 1937, term of the county court of Buffalo county commenced on May 3, and terminated on May 17. The instant case, without reference to the state of the pleadings, did not stand for trial until May 21, or four days after the May term of this county court had closed. Obviously, there was no express statutory requirement that the contestee should file his answer during the May term of the county court, and therefore no basis for the contention that he was in default in failing so to do.

The contestant contends that in an election contest under sections 32-1020 to 32-1040, Comp. St. 1929, when the contestee has tried his case in the county court on a general denial, the only issue in the district court on appeal for the latter court's decision is such pleaded facts as are necessary for the contestant to prove under the allegations of his petition in order to enable him to recover a judgment, and that the district court erred in the instant case in admitting evidence that Cecil Gallagher, Arthur Neville, Tom O. Car-

rick, Arthur L. Stegeman, Anna F. Thurston and Gladys Croston were not qualified voters at the time of the contested election, and all having voted for contestant, six votes should be deducted from contestant's total.

Our controlling special statute contains no requirement that the contestee shall file an answer or otherwise plead. The general rule appears to be: "Contestee may answer even where the statute does not provide therefor, but is not required so to do." Further, a cross-complaint "need not be filed in order that contestee may set up his own title to the office." 8 Standard Ency. of Procedure, 75, 76. These principles are recognized in this jurisdiction. *McWhorter v. Schramm,* 97 Neb. 103, 149 N. W. 306.

On the other hand, our special statute includes certain specific requirements as to the pleading of the contestant.

Section 32-1021, Comp. St. 1929, provides: "When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted or whose votes were rejected, if known, with the precinct, township, or ward where they voted or offered to vote, shall be set forth in the complaint."

In the construction of this language, we held: "When the complaint in a contested election case alleges the reception of illegal or the rejection of legal votes, the contestant, on motion, will be required to set out the names of the persons who so voted or whose votes were rejected, if known." *McWhorter v. Schramm, supra.*

But this act contains no similar provision as applicable to contestee. However, the rule of our Civil Code applicable is that such special proceedings are to be deemed civil actions, but so far as proceedings are prescribed by such special statute, they shall not be affected by the terms of the Civil Code, "until the legislature shall otherwise provide; but in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this Code, the proceedings shall be conducted in conformity thereto." Comp. St. 1929, sec. 20-2226.

It is obvious that the provisions above quoted render ap-

plicable to this class of controversies the provisions of section 20-852, Comp. St. 1929, relating to amendments in furtherance of justice, and also section 20-853 providing that errors not affecting the substantial rights of the parties must be disregarded. This conclusion is fortified by the express provision of section 32-1025, Comp. St. 1929, hereinbefore quoted, viz.: "The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter. * * * It shall be governed by the rules of law and evidence applicable to the case." The effect of the language quoted is to fully vest the trial tribunals with ample and complete powers of amendments of pleadings, to the same extent as those vested in courts of record.

The transcript also discloses that, while originally the contestee filed a general denial in the county court, during the initial trial of this cause in that court, after the introduction of evidence had been commenced, and contestant had rested, the contestee made due application in writing, supported by positive affidavit, to amend his answer by adding thereto, in appropriate language, that "Arthur Neville, Cecil Gallagher, Arthur L. Stegeman, Richard Fleffe, Tom O. Carrick and others whose names contestee does not know and cannot now state" voted at the election held in the city of Kearney, Nebraska, on the 6th day of April, 1937, and that each and all of said voters were not qualified electors at said election, and each of said electors cast their vote for the contestant. The county court denied this application. To this ruling the contestee by force of statute was given an exception.

It may be said in passing that the allowance of an amendment in an appropriate case is not to be denied solely because the trial has progressed to a particular stage, and amendments may be allowed after the evidence is closed. *Thomas v. Haspel,* 126 Neb. 255, 253 N. W. 73.

So, too, in reference to defendants, the applicable rule is "not so strict in respect to amending pleas, or adding a new

and different plea as a defense to the action; the reason given being that the plaintiff, if he has misconceived the form or nature of his action, can discontinue and bring a new action; whereas the defendant must avail himself of his defense in the action brought against him. The defendant would, therefore, be allowed to amend his pleading at a stage of the case when the plaintiff would not be allowed to amend his declaration, and to amend by setting up a new defense. And the various statutes have not changed the law in this respect." 1 Standard Ency. of Procedure, 863.

It may be noted that the county court, after the denial of the application to amend, determined the cause against the contestee. The latter thereupon filed his motion for a new trial, in which the refusal to permit the amendment to the answer was expressly challenged. This motion was overruled by the county court.

Without determining the propriety, force and effect of defendant's motion for a new trial, and the ruling of the county court thereon, it may be said that defendant duly executed his appeal bond and lodged his appeal in the district court for Buffalo county. This imposed on that appellate court the duty to hear the case, upon such evidence as might be properly presented to it, as a trial *de novo*.

Under the circumstances of this case, and within the limitations contained in the transcript on appeal, the general rule appears to be, viz.: "Where a hearing on an appeal from a judgment of a justice of the peace or other inferior court is in fact a trial *de novo*, the allowance of amendments is governed by the same general principles as would govern if the cause had been instituted originally in such appellate court." 1 Standard Ency. of Procedure, 887.

As applied by the district court, the amendment permitted by it in this trial *de novo*, in substance and effect, did not exceed in actual scope the amendment sought by defendant in county court, the refusal of which by the county court was, in effect, held erroneous by the district court. This determination we approve.

"The practice seems to be approved in states having

statutes governing proceedings on appeal similar to our own to either treat the amendment offered in the court below as having been filed or to permit it to be filed anew in the court of last resort." *Raley v. Raymond Bros. Clarke Co.*, 73 Neb. 496, 103 N. W. 57.

From this it follows that there was no violation of the rule requiring substantial identity of issues on the trial of the appeal in the district court, and the evidence as to the competency of the voters challenged by the contestee was properly received.

As to the specific facts involved in the merits of the contest: The stipulation of the parties is that, eliminating questioned ballots and challenged voters, contestant Swan received 1,392 votes and contestee Jesse Sherman Bowker received 1,393 votes.

From a careful examination of the record, it appears that Cecil Gallagher, Arthur Neville, Tom O. Carrick, Anna F. Thurston and Gladys Croston, at the time of holding this election on April 6, 1937, under the statutory requirements, were illegal voters, and that each voted for the contestant, and because thereof five votes should be deducted from contestant's total vote as above stipulated.

It further appears that Francis Gallagher, who voted at this election and whose capacity was challenged, was a legal voter at the time of casting his ballot; that Arthur L. Stegeman, whose capacity as a legal elector was challenged, was a student for many years at an educational institution situated in Kearney, Nebraska, and during that time lived and was employed in that city under circumstances that clearly brought him within the principles of the rules announced by this court in *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249, and particularly in the third paragraph of the syllabus thereof, viz.: "Persons otherwise qualified as voters who come to the seat of a university mainly for the purpose of obtaining an education, who are not dependent upon their parents for support, who have not the intention of returning to their parental home upon the completion of their studies, who are accustomed to leave the seat of the university dur-

ing vacation, going wherever they might find employment, and returning to the university when the term opens, regarding the seat of the university as their home and having no purpose formed as to their movements after completing their studies, are entitled to vote at the seat of the university."

The record discloses that, at the canvass of the votes in the district court, a total of 19 votes were challenged on the grounds that in the marking thereof by the voters the requirements of the governing statute had not been complied with, and that four ballots did not have indorsed thereon the names of two judges. We have no allegations of fraud in this case. As to the four ballots lacking proper indorsement of judges, it is contended that, as these ballots were otherwise regular, notwithstanding the rule to the contrary previously promulgated by this court, in view of the fact that in the instant case there is no issue of fraud, this mandatory rule should be rescinded and the statute be construed as directory only. A careful examination of the terms of our Australian ballot law compels the conclusion that they are not properly subject to the construction contended for, and that in harmony therewith is the rule stated by this court, as follows: "The requirements of the Australian ballot law, that the names or signatures of the two judges of an election shall be written on the back of each ballot to be used, and that a ballot not so indorsed shall be void, and not counted, are mandatory, and are not inimical to constitutional provisions." *Orr v. Bailey,* 59 Neb. 128, 80 N. W. 495. See, also, *Mauck v. Brown,* 59 Neb. 382, 81 N. W. 313; *Bingham v. Broadwell,* 73 Neb. 605, 103 N. W. 323; *Crosby v. Haverly,* 82 Neb. 565, 118 N. W. 123; *Rasp v. McHugh,* 121 Neb. 380, 237 N. W. 394; *State v. Marsh,* 123 Neb. 423, 243 N. W. 277.

The challenged ballots have been carefully examined and canvassed by this court. We agree with the action of the trial court in the rejection of exhibit 2, a "spoiled ballot," and exhibit 7; and also exhibits 3, 14, 15 and 18, as ballots not bearing the required indorsement of election officials.

We approve the rejection of exhibit 13, as the voter has evidently signed his own name on the back thereof. We also approve the action of the trial court in receiving and counting as legal votes for contestant Swan exhibits 6, 10, 12, 16 and 17. On due consideration, we find that exhibits 1, 4, 8 and 9 are each legal ballots, whereon the intent of the elector is clearly expressed, and the same should be received and counted in favor of contestant. In like manner, and for the same reason, exhibits 5, 11 and 19 should be counted for contestee Bowker.

As hereinbefore stated, the stipulation of the parties is that, exclusive of the 19 challenged ballots, at the election at Kearney, Nebraska, on April 6, 1937, contestant Swan received 1,392 votes and contestee Bowker received 1,393 votes. Of the 19 challenged votes, contestant Swan is entitled to receive 9 votes, and to have deducted the 5 illegal votes cast for him. The contestee is entitled to have 3 votes of the 19 credited to his total. Therefore, we find that at this election, 1,396 legal votes were cast for C. Edwin Swan, and 1,396 were cast for Jesse Sherman Bowker. The district court for Buffalo county therefore erred in the judgment entered by it in this cause.

The judgment of the trial court is reversed, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

DEPARTMENT OF BANKING, APPELLEE, V. R. T. FLOTREE ET AL., APPELLANTS.

281 N. W. 857

FILED OCTOBER 28, 1938. No. 30393.

1. **Banks and Banking.** Plaintiff possessed ample powers to bring and maintain this action. *Department of Banking v. Walker*, 131 Neb. 732, 269 N. W. 907.
2. **Guaranty.** The instrument in suit provided for an absolute, not a conditional, guaranty of the payment of the bank's creditors in definite amounts at a time certain. The words of guaranty

contain and involve no such express condition as that upon which the defense in this action purports to be based.

3. ———. The contention, under the facts in this record, that the contract in suit was not effective unless and until all creditors of this bank should sign it cannot be accepted. The evidence, direct and circumstantial, especially in view of the findings of the trial court, establishes a contrary conclusion. In addition, the unexplained delay for three years, during which the bank continued to function under the terms of this obligation without objection, protest or dissent on part of any of appellants, operated as a waiver of this defense, if such defense ever existed.

4. **Evidence** in the record examined, and *held* to sustain the findings and judgment of the district court.

APPEAL from the district court for Boone county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

W. J. Donahue, Williams & Williams and *Earl Hasselbalch,* for appellants.

Seymour S. Sidner and *Clarence G. Miles, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an action at law brought by the Department of Banking of the state of Nebraska, receiver and liquidating agent of the Farmers State Bank of Albion, Nebraska, a corporation, against R. T. Flotree and others, upon a contract in writing, which, for convenience, we will call a contract guaranteeing the payment in full of the creditors and depositors of the bank named. A copy of this contract was attached to and forms a part of the amended petition upon which the action was tried. To this amended petition, defendants R. T. Flotree, Milton B. Krause, Robert D. Flory, E. M. Johnson, F. R. Smith, A. N. Lamb, executor of the estate of A. W. Lamb, deceased, Elizabeth A. Morehead, executrix of the estate of S. B. Morehead, deceased, Marie Fischer, administratrix of the estate of William Fischer, deceased, Henry Becker, Elsie Zuber, administratrix of the estate of Fred Wiegman, deceased, and James T.

Clipston, joined in answer. To this answer plaintiff filed reply. Defendants T. B. Bowman, M. C. Nore and Elsie Zuber, administratrix of the estate of Fred Wiegman, deceased, also, in addition to the answer already referred to, filed separate answers. To the separate answers thus filed, the plaintiff filed replies. On the issues thus formed, a jury was waived, evidence was introduced, and, at the conclusion of the trial, findings of fact and a judgment were made and entered by the district court against all defendants, excepting John Bentjen and James T. Clipston, in a total sum of $95,821.41. To the judgment, motions for new trial were filed by defendants, upon consideration of which the district court, on February 4, 1938, reduced the amount of the judgment to $70,985.21. From this final judgment, the defendants appeal.

Appellants present three propositions in this court to sustain their appeal, viz.: "1. The plaintiff has no statutory or contractual right to bring this action. 2. A contract signed upon condition that others will also sign is unenforceable if such others fail or refuse to sign. 3. The plea of estoppel is not available to the plaintiff under the facts of this case."

In consideration of the first contention of appellants, it will be noted that the same question was presented to this court in *Department of Banking v. Walker*, 131 Neb. 732, 269 N. W. 907. An examination and comparison of the records discloses that in the *Walker* case, as well as in the instant case, copies of the contract sued upon were attached to each petition and expressly made a part thereof. While the names of the defendants, the respective dates, and amounts, recited in these several contracts, conform to the special transaction to which the contracts respectively pertain, the substantial agreements contained therein are identical and are framed in substantially identical language. In the *Walker* case, a general demurrer was sustained in the district court, but such ruling was reversed in this court. This decision must be considered in the light of the following principles:

"A written instrument incorporated as an exhibit and expressly made a part of a pleading, and a part of a cause of action or a defense therein stated, controls the allegations thereof which it contradicts or which are inconsistent therewith." *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583.

In other words, a contract incorporated into a pleading as part of a cause of action or defense controls the allegations which it contradicts. *Carey v. Zabel,* 112 Neb. 16, 198 N. W. 169; *Shafer v. Wilsonville Elevator Co.,* 121 Neb. 280, 237 N. W. 155; *Gibson v. Dawes County,* 129 Neb. 706, 262 N. W. 671.

"In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant." *Carson v. City of Hastings,* 81 Neb. 681, 116 N. W. 673.

In the *Walker* case, every objection now made to the validity of the terms of the present contract was before this court, fully considered, and determined adversely to the contention of appellants. Under the principles announced in the above cases, the validity of the basic contract and agreement in such *Walker* case, including the competency of the plaintiff to make, carry out, and enforce the same, notwithstanding the fact that the bank had not subscribed to the instrument in suit, was challenged by the demurrer there under consideration, and properly therein determined. We find nothing presented in appellants' contentions which would require a reconsideration of the doctrines announced in the *Walker* case, and the same are adhered to.

"When, in any case, an exhibit so attached is the foundation of the cause of action or defense to which it relates, the validity or sufficiency thereof, as a matter of law, to constitute or establish such cause of action or defense, may be determined on demurrer to the pleading to which it is so attached." *Union Sewer Pipe Co. v. Olson,* 82 Minn. 187, 84 N. W. 756.

The present review is not a trial *de novo*. A jury having been waived, the findings and judgment of the trial judge have the force and effect of a jury's verdict. In so far as this result may be said to have been based on conflicting competent evidence, it is binding on this tribunal.

Read in the light of these principles, the record before us sustains the conclusion that those interested in this bank were of the opinion that, if this institution could be liquidated under the direction of its owners, it would pay out its creditors in full, and the necessity of enforcing the double liability of its stockholders would be avoided. A consultation with the then head of the State Banking Department was had on this subject on October 20, 1931. The contract in suit was prepared at Lincoln, and on October 27, 1931, two officers of the bank made a special trip to Lincoln to secure this contract. The emissaries of the bank returned to Albion the same evening, bringing the agreement with them. A meeting of the bank directors of this bank was held at its bank building that evening, and all directors were present. They accepted the terms of the contract, signed it, and voted to start liquidation under it the next day. The following day, October 28, 1931, the officers and directors started to liquidate the bank under this contract. On October 29, 1931, the newspaper in Albion, one of general local circulation, published on its front page a statement that this bank was being liquidated and the stockholders were guaranteeing the deposits. On October 31, 1931, this contract (now in suit), which had been obtained at Lincoln on October 27, 1931, was returned to the Department of Banking by the cashier of the bank, signed by all the officers and directors, and in his letter of transmittal, it was stated, viz.: "During the past two days we have paid the stated 20% to about 40% of our entire volume of deposits and to about 50% of our depositors. Not one has questioned our proposition or hesitated about signing the agreement. So far the arrangement looks good and the community is surely with us."

On November 17, 1931, the cashier forwarded to the

State Banking Department "property statements of the eight that constitute such board" (of directors). The record discloses that the other defendants executed single copies of the original contract, first referred to, one of the terms of which provided that "the execution of one copy by any of the parties shall be as binding as though said party had executed and delivered all of the copies."

The agreement in suit provided in part, viz.: "Whereas, it is the express intention of the stockholders, directors, and officers of said bank to pay each and every depositor and creditor in full and to that end to convert all of its assets into cash and distribute the same ratably and equitably among said depositors and creditors."

The defendants continued, under this contract, to liquidate until January 8, 1935, without molestation on the part of the stockholders, depositors or creditors.

It further appears that none of these defendants, now appealing, at any time notified either the Department of Banking or the creditors of the bank that they did not expect to be bound by this contract in suit. In 1933 several of these defendants filed claims against the estates of deceased fellow directors, and also against the estate of a nondirector stockholder, as contingent claims based upon this contract in suit.

The Department of Banking, relying upon this contract, permitted the defendants to continue to have the bank open thereunder until January 8, 1935. On the date last named, after there had been a failure to pay the depositors and creditors under this contract, the Department of Banking, under its statutory powers, took over the remaining assets of this bank, and instituted this action with the results as hereinbefore set forth.

We cannot accept the contention, under the facts in this record, that the contract in suit was not effective unless and until all creditors of this bank should sign it. No clause contained therein so stated. The evidence, direct and circumstantial, establishes a contrary conclusion.

In *Farmers State Bank of York v. Brock*, 120 Neb. 551,

234 N. W. 92, a case presenting similar questions, this court said:

"However, whether there was an agreement as to the number of stockholders who should sign is of small importance, as we view it. Whatever the discussion, or understanding, none of the creditors was a party to it; none of them was there or represented. Obviously an agreement such as is sought to be established by the defendants, and to which the creditors were not parties, and of which they had no knowledge, could not be operative as to them. *Kansas City Terra-Cotta Lumber Co. v. Murphy*, 49 Neb. 674.

"It is further contended by the defendants that the guaranty is not effective because it was not delivered to the officers of the bank by some one authorized to deliver it. There is some evidence in the record to the effect that neither Brock nor Dietrick, president and secretary, respectively, of the association, delivered it to the bank. In the circumstances, however, we are of the opinion that it is not of vital importance who delivered the guaranty to the bank. It was delivered presumably by some one authorized to do so. All of the defendant signers knew that it was with the bank, and that others making loans and extending other forms of credit to the association were relying upon the guaranty as security."

In view of the conduct of this banking business for some three years, and the acquiescence therein of stockholders, depositors and creditors in the manner in which it was carried on, it clearly appears that there was a universal reliance on this contract in suit. In fact, 269 depositors, representing $87,911.93 of the deposits, actually formally subscribed and accepted this contract.

This instrument provided for an absolute, not a conditional, guaranty of the payment of the bank's creditors in definite amounts at a time certain. The words of the guaranty contain and involve no such express condition as that upon which the defense in this case purports to be based or founded.

It also appears that the State Banking Department was

not apprised of defendants' present claims, nor in any manner chargeable with notice thereof, prior to its acceptance of this contract on its face duly executed by the signers thereof. Three years passed with the bank continuing under the terms of this obligation without objection, protest, or dissent by or on the part of any of the parties thereto. Thus, it clearly appears that, by their conduct, appellants waived this defense, if it ever had an existence. *Morton v. Harvey,* 57 Neb. 304, 77 N. W. 808; *Middleboro Nat. Bank v. Richards,* 55 Neb. 682, 76 N. W. 528.

We further find that the trial court committed no error in its refusal to reopen the case upon application of defendant Becker, there being no showing of diligence whatever.

Likewise, the trial court was correct in the exclusion of tendered proof as to declarations made by Wiegman, deceased. His so-called declarations, as offered by defendant Zuber, were clearly hearsay, and, considered as an entirety, not against interest, within the scope of the exceptions to the hearsay rule.

It follows, therefore, that the findings and judgment of the trial court find ample support in the evidence before us, and are

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOMER SMITH ET AL., APPELLANTS.
281 N. W. 851

FILED OCTOBER 28, 1938. NO. 30305.

1. **States.** Section 27-325, Comp. St. 1929, provides, in substance, that in any civil action instituted by the state, except in actions for the collection of revenue, defendant may, as a matter of defense, plead any set-off, counterclaim or cross-demand that he may have arising to him in his own right, and upon which an action could be maintained by him against the state. The case at bar is one for revenue and subject to the foregoing provision of the statute.

2. **Licenses: VENUE.** Section 66-407, Comp. St. 1929, provides the manner of bringing an action for failure to pay taxes, as provided in the motor vehicle fuels act, and contemplates an ordinary civil action in any county in which service of process can be had upon the defendant. In the instant case, the district court for Holt county is a court of competent jurisdiction for such purpose.
3. **Taxation.** "In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority." *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N. W. 661.
4. **Licenses: BONDS: SURETIES: RELEASE.** The bond in suit required prompt payment to the state of Nebraska of the tax on motor vehicle fuels, imposed by law, with all penalties and interest, in the way and manner at the time provided by law, and an increase in the obligation of the bond by subsequent legislative enactment, by raising the tax on gasoline one cent a gallon, is not a sufficient or material alteration such as to release the sureties from their obligation. The obligation must be clearly and substantially changed in character and nature.
5. **Commerce.** The law is well-settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, receipts therefrom, or the occupation or business of carrying it on.
6. **Licenses.** The tax imposed by House Roll No. 6 (Laws 1935, Special Session, ch. 16) is an excise tax upon the use and distribution of gasoline within the state.
7. **Constitutional Law: GASOLINE: EXCISE TAX.** An excise tax may be imposed upon the use and distribution of motor vehicle fuels without violation of the commerce clause of the federal Constitution, and is consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. *Burke v. Bass*, 123 Neb. 297, 242 N. W. 606.
8. **Estoppel.** Where the evidence discloses that defendants have affirmatively brought themselves within the provisions of a statutory enactment, have become licensed as dealers in the state in the sale, distribution and use of motor vehicle fuels in the state, and have given bond for such purpose which has been duly approved, and have made reports to the proper officers of the state as to the amount of taxes owing by them, and have paid taxes as provided for by the act, and in all things have represented themselves as dealers in the sale, distribution and

use of motor vehicle fuels in the state, they are estopped from denying that they are dealers in the distribution, sale and use of motor vehicle fuels in the state, within the contemplation of the act.

9. ———. "Estoppel means 'the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.' Bouvier's Law Dictionary." *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N. W. 869.

10. ———. "Whether or not the doctrine (of estoppel) applies depends upon the particular facts of each case." *Rodgers v. John*, 131 Md. 455, 102 Atl. 549.

11. **Constitutional Law.** "A statute will not be declared unconstitutional unless necessary to proper disposition of pending case." *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642.

APPEAL from the district court for Holt county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Lee Basye, James P. Marron and *Davis & Vogeltanz*, for appellants.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an action by the state of Nebraska against Homer Smith and others, doing business as a partnership under the name of the New Deal Transport Line, and Carl A. Asimus and Tony Asimus. The partners are alleged to have been engaged in the use and distribution of motor vehicle fuels, and Carl A. Asimus and Tony Asimus are sureties on the bond furnished to the state of Nebraska, to recover excise taxes, due the state upon motor vehicle fuels under the terms and provisions of House Roll No. 6, enacted by the Fifty-first session of the Nebraska legislature. Laws 1935, Special Session, ch. 16.

Plaintiff's petition alleges taxes due from defendants for the importation into the state of Nebraska of certain motor

vehicle fuels for use, distribution, sale and delivery in the state for the month of January, 1936, and seeks to recover a tax of five cents a gallon in the amount of $1,464.12; alleges that the defendants procured a license to carry on the business of importers of motor vehicle fuels, and executed and delivered a bond in the sum of $4,000; that they failed to pay the tax assessed on or before February 15, 1936, and are subject to a penalty for such refusal in the sum of $147.89, which was assessed. Plaintiff prays judgment for such amount and interest.

Defendants allege partnership, deny the authority of the state to collect an excise tax; allege that payments were made under duress and coercion and made by mistake. Defendants attack the constitutionality of the act, and by cross-petition sue William B. Banning, individually and as director of the department of agriculture and inspection of the state of Nebraska, and Walter H. Jensen, individually and as treasurer of the state of Nebraska, and in their cross-petition allege payments to the state under an excise tax, under provisions of Senate File No. 363 (Laws 1935, ch. 155) and House Roll No. 432 (Laws 1935, ch. 161) of the Fiftieth legislative session of Nebraska, which acts were held to be unconstitutional. The details of the cross-petition will not be set out, for the reason that it was properly stricken from the files upon motion of the plaintiff, and the special appearance of Banning and Jensen properly sustained. The district court awarded plaintiff a judgment against defendants and each of them in the sum of $1,660.34, with interest and costs. Defendants appeal to this court.

The appellants contend that the court erred in sustaining the special appearance of defendants Banning and Jensen and the plaintiff's motion to dismiss the cross-petition, citing sections 20-812, 20-813, 20-815, and 20-834, Comp. St. 1929.

This is a suit for revenue, brought by the state, and comes within the express provisions of section 27-325, Comp. St. 1929, which reads in part as follows: "In any civil action instituted by the state, except in actions for the collection

of revenue, * * * the defendant may, as a matter of defense, plead any set-off, counterclaim or cross-demand that he may have arising to him in his own right, and upon which an action could be maintained by him against the state."

Appellants attack the jurisdiction of the district court for Holt county, citing section 20-404, Comp. St. 1929, which provides that actions must be brought in the county in which the cause arose. The case at bar is governed by section 66-407, Comp. St. 1929, which in part reads: "Whenever any dealer shall fail to pay any tax due under the provisions of this Act, within the time limited herein, the attorney general, through the county attorney in the county in which the action is brought, shall enforce payment of such tax by civil action in the name of the state against such dealer, for the amount of such tax, in a court of competent jurisdiction." This provision contemplates an ordinary civil action in any county in which service of process can be had upon the defendant.

In the case of *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661, this court held: "In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority." This holding was followed in *Arlington Oil Co. v. Hall,* 130 Neb. 674, 266 N. W. 583, and in *Smithberger v. Banning,* 130 Neb. 354, 265 N. W. 10. Individual liability does not attach to Jensen or Banning.

The appellants assign as error that the change in the law, increasing the gasoline tax to five cents a gallon, releases the sureties on the bond from paying such tax, because the bond was executed when the law fixed the tax at four cents a gallon. In this connection, appellants state that the state's exhibit 1, a purported bond, is apparently signed by C. A. Asimus and Tony Asimus, while the exhibit in evidence shows A. C. Asimus at one place and C. A. Asimus at another; that the record is devoid of proof that the parties who signed the bond in evidence are the same

persons as appellants Carl A. and Tony Asimus; that there is no admission, in fact, and that there is a general denial in the answer.

The bond, with signatures thereon, admitted in evidence without objection, is sufficient to disclose that Carl A. Asimus and A. C. Asimus are one and the same party, and that C. A. Asimus intended to be bound by the conditions of the bond. As to the proper place for the signature, and that one may nevertheless become bound by any writing or signature wherever placed, evidencing his intention to become bound as surety, see 50 C. J. 33. In support of such alleged error, the appellants state: "It is a well-established rule that the law in effect at the time becomes a part of such a bond and a material change in the law releases the sureties;" that the law in effect at the time this bond was signed was section 66-405, Comp. St. Supp. 1933, which act provided for a tax of four cents a gallon; that this act was amended in 1935 and declared unconstitutional, and was reenacted at a special session of the 1935 legislature; that the acts of that session are claimed to be unconstitutional, and that among other changes in the law was that the rate of tax was increased to five cents a gallon, which is a material change, and releases the sureties.

The bond requires prompt payment to the state of Nebraska of the motor vehicle fuels tax imposed by the law, with all penalties and interest, in the way and manner at the time provided by law. In 61 C. J. 1033, it is said that if a bond "is conditioned for the faithful performance of the collector's duty, or for the payment of all money collected by him, it will cover every class and variety of taxes lawfully committed to him for collection, including new taxes provided for by statutes enacted after the execution of the bond." Many cases are cited by both appellants and appellee on this proposition of law, but a careful reading of the bond indicates clearly that it is within the contemplation of the sureties on this bond to pay the tax imposed by law, with all penalties and interest, in the way and in the manner provided by law. The alteration was not a material

one, and, in order to release the sureties, such alteration must be clearly and substantially changed in character and nature. *McAuley v. Cooley,* 47 Neb. 165, 66 N. W. 304. In the case at bar the sureties bound themselves to the extent of $4,000 on condition that the principal would pay the state the tax on motor vehicle fuels imposed by law. The obligation of the principal was never changed or altered. Consequently, the obligation of the sureties is a continuing and a subsisting one. This assignment of error is without merit.

The appellants assign as error that the judgment and decree of the trial court are contrary to law and not supported by the evidence; that the plaintiff has failed to prove by competent evidence any cause of action against the defendants. These assignments of error may be grouped into one.

It is a general, well-settled proposition of law that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, receipts therefrom, or the occupation or business of carrying it on. *Ozark Pipe Line Corporation v. Monier,* 266 U. S. 555. The principle of law was restated and further explained in *Minnesota v. Blasius,* 290 U. S. 1. See *Purchase v. State,* 109 Neb. 457, 191 N. W. 677.

Section 66-409, Comp. St. 1929, and House Roll No. 6 carried this provision which has not been changed: "No provisions of this Act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be permitted under the provisions of the Constitution and laws of the United States." The act is in agreement with the law on this subject as announced by the supreme court of the United States.

The tax sought to be levied by House Roll No. 6 is an excise tax and has not changed its character from the time of the original act, or the act of 1935, which was declared unconstitutional. This court held in the case of *Burke v. Bass,* 123 Neb. 297, 242 N. W. 606:

"Tax imposed by section 66-405, Comp. St. 1929 (which

is analogous to the tax imposed in the instant case by House Roll No. 6), is an excise tax upon the use and distribution of gasoline within the state.

"An excise tax may be imposed upon the use and distribution of motor vehicle fuel without violation of the commerce clause (section 8, art. I) of the federal Constitution.

"An excise tax upon the use and distribution of motor vehicle fuel is consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States." See *State v. Cheyenne County,* 127 Neb. 619, 256 N. W. 67.

House Roll No. 6 (Laws 1935, Special Session, ch. 16) repealed the original sections 66-405 and 66-416, Comp. St. Supp. 1933, and chapters 155 and 161, Laws 1935. Section 66-403, Comp. St. Supp. 1933, provides for every dealer, engaged in business, to procure a license from the department of agriculture and inspection to permit said dealer to transact business within the state of Nebraska. The department of agriculture and inspection, upon the application of any person, or persons, having filed the certificate required by law, may issue a license, provided the applicant shall either have made a cash deposit or have furnished a good and sufficient bond, running to the state of Nebraska, conditioned for the payment of all taxes and penalties that may have been assessed against him under the provisions of the act. House Roll No. 6, which amends section 66-405, Comp. St. Supp. 1933, provides in part as follows:

"Every dealer who is now engaged or who may hereafter engage, in his own name or in the name of others, or in the name of his representative, or agents in this state, in the sale, distribution and use of motor vehicle fuels, shall render and have on file with the Department of Agriculture and Inspection by the fifteenth day of each calendar month, beginning with the fifteenth day of the first month after this act shall become effective, on forms prescribed, prepared and furnished by said Department of Agriculture and Inspection, a sworn statement of the number of gallons of motor vehicle fuels, to be based on capacity of container,

received, imported and unloaded and emptied or caused to be received or imported and unloaded and emptied by such dealer in the state of Nebraska."

The evidence discloses that the defendants submitted to the statutory enactment, invoked its provisions by becoming licensed thereunder, qualified by submitting an approved bond, made report to the department of the state, and were in all things seeking compliance with and performance under the law, and by exhibit 3 defendants admitted obligation to the state in the amount of five cents a gallon as an excise tax on all the gasoline brought into the state during January, 1936. The report of the defendants, while admitting an indebtedness of $1,464.28, due the state of Nebraska for taxes on gasoline brought into the state in January, 1936, sought to offset it as against debt credit for cash, exacted from the defendants for the months of March, April, May, June, July and August, 1935, under an act declared by this court to be unconstitutional. The exhibits disclose that defendants designate themselves as licensed importing dealers and resellers. The statute under which defendants operated and under which the report was filed applies only to dealers in the state in the sale, distribution and use of motor vehicle fuels. The exhibits further disclose the date, the place of unloading, car or truck number and the invoice number, unloading shown from the refinery to points in Erickson, O'Neill, Burwell and Ainsworth.

Defendants, as shown by the evidence, have affirmatively brought themselves within the provisions of the statutory enactment, and have represented themselves to the state as licensed importing dealers and resellers as dealers in the state in the sale, distribution and use of motor vehicle fuels; gave their bond for such purpose, which was duly approved, and paid taxes under the act as such dealers. Having brought themselves within the provisions of the act as distributors and dealers in the sale, distribution and use of motor vehicle fuels in the state, and having failed to show that they are engaged in interstate commerce as such, the defendants are estopped from denying that they are

such dealers for the distribution, sale and use of motor vehicle fuels in the state, within the contemplation of the act.

The doctrine of estoppel is pertinent to a decision of this case. This court said in *Graham Ice Cream Co. v. Petros,* 127 Neb. 172, 254 N. W. 869: "Estoppel means 'the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.' Bouvier's Law Dictionary."

In *Hodde v. Hahn,* 283 Mo. 320, 222 S. W. 799, "estoppel" is defined as "A preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act, allegation or denial of a contrary tenor." To the same effect are *Reid's Admr. v. Benge,* 112 Ky. 810, 66 S. W. 997; *Wilkins v. Suttles,* 114 N. Car. 550, 19 S. E. 606; *South v. Deaton,* 113 Ky. 312, 68 S. W. 137; *Demarest v. Hopper,* 22 N. J. Law, 599, 619.

In *Lawson v. Edwards,* 293 S. W. (Mo. App.) 794, it was held: "To constitute 'estoppel in pais,' admission, statement, or act inconsistent with position afterwards relied on, action by other party on faith thereof, and injury to such party from allowing first party to contradict or repudiate it, must concur."

In *Oklahoma State Bank v. Galion Iron Works & Mfg. Co.,* 4 Fed. (2d) 337, it was held: "To constitute an 'estoppel,' in the absence of false representations by the party sought to be estopped, he must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him and in reliance on which he acted."

In *Lewis v. King,* 157 La. 718, 103 So. 19, it was held: "Estoppel is bar precluding denial of truth of fact settled by proceedings of judicial or legislative officers or by act of party himself, either by conventional writing or by representations expressed or implied *in pais.*"

As held in *Rodgers v. John*, 131 Md. 455, 102 Atl. 549: "Whether or not the doctrine (of estoppel) applies depends upon the particular facts of each case." And "Whatever may be the real intention of the party making the representation, it is absolutely essential that the representation, whether consisting of words, acts or silence, shall be believed and relied upon as the inducement for action by the party claiming benefit of the estoppel and that so relying, and being so induced by it, took action."

Assignments of error attacking the constitutionality of the act will not be discussed or determined. In *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642, this court announced the rule: "A statute will not be declared unconstitutional unless necessary to proper disposition of pending case." This holding was followed in *Howarth v. Becker*, 131 Neb. 233, 267 N. W. 444, and in *State v. Ruback, ante*, p. 335, 281 N. W. 607.

The record is void of evidence on the part of the defendants of their paying taxes under protest or that coercion was used against them.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

GLENN O. HAINES V. STATE OF NEBRASKA.
281 N. W. 860

FILED OCTOBER 28, 1938. NO. 30360.

1. **Criminal Law.** "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State*, 115 Neb. 277, 212 N. W. 606.
2. ———. Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent.

3. **False Pretenses.** Intent to defraud may be proved by the circumstances surrounding the transaction.
4. ———: RESTITUTION. The offense of obtaining money by means of an insufficient-funds check was completed at the time the check was uttered and passed, and the fact that defendant subsequently made some degree of restitution to the payee named in the check does not affect the question of his guilt.
5. ———: ———. Section 28-1212, Comp. St. 1929, does not contemplate restitution on the part of a defendant charged thereunder, and where the evidence discloses an arrangement made by defendant with certain partners, and such arrangement is not known to the payee of the check until after it had been returned for insufficient funds, such disclosure to the payee as to defendant's credit is not to be considered in determining the guilt or innocence of defendant under said section.
6. **Criminal Law:** SENTENCE. Under the circumstances and the evidence, the sentence, as fixed by the trial court, is excessive and warrants modification as provided in section 29-2308, Comp. St. 1929.

ERROR to the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed: sentence reduced.*

B. J. Cunningham and *W. P. Lauritsen,* for plaintiff in error.

Richard C. Hunter, Attorney General, Harry S. Grimminger and *Lloyd W. Kelly, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

Plaintiff in error, hereinafter designated as defendant, was proceeded against under section 28-1212, Comp. St. 1929, governing the issuance of an insufficient-funds check. The information is regular in form. The defendant was convicted of the offense by a jury in the district court for Hall county in September, 1937. Motion for a new trial was overruled. Defendant brings this proceeding in error.

The evidence establishes that defendant, a man 53 years of age, engaged in the live stock business since he was 19 years old, purchased horses for what was known as the

Iowa Horse Sales Company; that he had, previous to the time of giving the check in question, purchased horses, by check, from the Grand Island Live Stock Commission Company, a corporation engaged in handling and selling live stock on commission, and was known to the officers of the company, especially to the secretary thereof, who handled the office business. On June 6, 1934, defendant purchased from the commission company 33 head of horses, which were settled for that day by a check, designated in the record as exhibit 1, drawn on the Monmouth Trust & Savings Bank, Monmouth, Illinois, dated June 6, 1934, payable to the order of the Grand Island Live Stock Commission Company, in the amount of $1,717 for 33 horses, signed by Glenn O. Haines, and bearing the statement "not sufficient funds." The horses were loaded the same evening and consigned to Galesburg, Illinois.

The evidence further establishes that defendant was in the live stock business as a partner with one Woods and Faye Houtchens of Monmouth, Illinois; that the account of the Iowa Horse Sales Company carried in the Monmouth Trust & Savings Bank was subject to check by either Mr. Houtchens or the defendant. The agreement between the partners was to the effect that Woods would furnish the money, Houtchens would sell the horses, and the defendant would do the buying, and when the defendant would purchase horses he would then wire Houtchens or Woods, and the money would be deposited to meet the check given by defendant. Some 40 to 50 car-loads of horses had been purchased in this manner. The defendant had previously given checks to the Grand Island Live Stock Commission Company, the complainant, which were paid. The employees of the bank at Monmouth, who testified, did not know the defendant, and, to their knowledge, had not seen him, but had honored checks bearing his signature. Apparently, defendant had handled none of the banking affairs of the partnership. The horses in question were sold by defendant, nine head for $603.95, which amount was given by the defendant to Houtchens. This sale was made on June 9, 1934, or

three days after the check was given. On June 16, 1934, three head of horses were sold for $206, and the money was turned over to Houtchens, who indorsed the check and paid the amount to the complainant. On June 23, 1934, four head of horses were sold for $207.50, which was turned over by defendant to Houtchens, who did not deposit the money, and none of it was sent to the complainant. One horse died. Two head of horses were sold by defendant for $100, and he remitted this amount to the complainant.

Defendant was directed by a letter written by John Torpey, president and general manager of the complainant, dated August 22, 1934, and addressed to defendant in care of the Iowa Horse Sales Company at Monmouth, that if he was unable to take care of the balance due on the horses, he should load and ship them to Janesville, Wisconsin, where a sale was to be held September 1, and that one Clyde Hoops would be there to take care of the horses and see that they were sold. The defendant did ship 14 head of horses to Janesville. From the sale of these horses defendant had given Houtchens $811.45, which Houtchens failed to send to the complainant. The defendant obtained personally $25 for expense money and an additional $10 for his expenses to Decatur, Illinois, and did not receive any other sum personally.

Defendant contends that the evidence is insufficient to submit the case to the jury, and moved for a directed verdict at the close of the state's evidence, and again at the close of all the evidence, both of which motions were overruled by the trial court, and the cause submitted. In this connection the defendant contends that the essential element of the offense, which must be proved by the state beyond a reasonable doubt, is that the defendant made and delivered the check with intent to defraud the complainant,—in this case the Grand Island Live Stock Commission Company.

Section 28-1212, Comp. St. 1929, in part provides: "Any person who, with intent to defraud, shall make or draw, or utter, or deliver, any check, draft, or order for the payment of money, upon any bank or other depository, knowing at

the time of such making, drawing, uttering or delivering, that the maker, or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full upon its presentation, shall upon conviction, be punished," etc.

Section 28-1213, Comp. St. 1929, relates to rules of evidence and presumptions that are pertinent to the offense, as stated in the preceding section, and reads in part: "In any prosecution under this act as against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee because of lack of funds or credit, shall be presumptive evidence of intent to defraud and of knowledge of insufficient funds in, or credit with such bank," etc.

Defendant contends that the bare presumption arising from this statute is the sole evidence upon which the state must rely in establishing the animus of the alleged crime. Defendant further insists that, in view of the evidence that he acted in good faith, following the instructions of the complainant, saw to it that as much money as he was able to obtain was returned from the sale of the horses, and, in fact, cooperated with the complainant in every way possible and did not receive any of the benefits of the transaction, this evidence overcame the presumption of intent, established lack of intent, and placed the burden on the state to prove such intent beyond a reasonable doubt; that the state presented no rebuttal evidence.

The leading case in Nebraska on this subject, and cited by the state and by the defendant, is *Lahners v. State,* 118 Neb. 184, 223 N. W. 951. In the body of the opinion, the writer, speaking of the insufficient-funds check statute, said (p. 188): "The legislature has provided that the doing of the act in this case shall be presumptive evidence of intent and knowledge. The act denounced as a crime in this statute is *malum prohibitum,* and as such it is within the power of the legislature to lessen the degree of proof necessary relative to elements of the crime which might have been eliminated altogether as an essential element of the

offense. The presumption provided by the statute is not conclusive and is rebuttable. It does not shift the burden of proof to the defendant. The presumption of innocence is still a matter of evidence to which the defendant is entitled, but along with it the jury are entitled to consider the presumption provided by this statute as to knowledge and intent."

When the defendant made and signed this check for the payment of the horses, such action on his part amounted to a representation that the check would be paid on its presentation, and that he had sufficient funds in the bank with which to pay the check on its presentation, or had arranged with the bank for credit. The evidence does not disclose that the commission company had in any way known of the agreement between Mr. Houtchens, Mr. Woods and defendant, or that a partnership existed among these three men, until subsequent to the time that the check was returned on account of insufficient funds.

The evidence further discloses that defendant made no arrangement with the bank for credit; that is, that he had no understanding with the bank for the payment of such check or draft. He knew, or must have known, that he had insufficient funds in the bank with which to pay the check, for the reason that on previous occasions he had wired his partners to have the money in the bank to meet the checks that he was giving. He did not follow that course this time. He did not inform the payee of the check of his partnership arrangement. Complainant believed, and had a right to believe, that it was dealing solely with the defendant, and it looked to him for payment of this check. There is also evidence that on the 23d day of June, 17 days after the check was issued and at least seven days after defendant had notice that the check was not paid, the sum of $207.50, money collected from the sale of horses, was placed in the hands of defendant's partner Houtchens, which is unaccounted for by him, in so far as the complainant is concerned. The alleged partners did not testify; neither did defendant recover any amount from the alleged partners

for the benefit of the complainant. More than three years had elapsed from the giving of the check to the time of trial. The complainant has been deprived of property and money by virtue of the transaction.

As stated in *Lahners v. State, supra,* the jury are entitled to consider the presumption provided in section 28-1213, Comp. St. 1929, as to knowledge and intent; and in the case of *White v. State, ante,* p. 154, 280 N. W. 433, it was held: "Intent to defraud may be proved by the circumstances surrounding the transaction." In the instant case the jury considered the presumption, as provided in said section 28-1213, as to knowledge and intent, the circumstances shown by the evidence, and also the pertinent fact that defendant, on his own admission, had not arranged for credit with the bank to pay his check. The evidence was sufficient to permit the jury to pass upon the question of intent to defraud.

In *Williams v. State,* 115 Neb. 277, 212 N. W. 606, we held: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." This holding was followed in *Matters v. State,* 120 Neb. 404, 232 N. W. 781; *O'Connor v. State,* 123 Neb. 471, 243 N. W. 650; *Buckley v. State,* 131 Neb. 752, 269 N. W. 892.

"Where there is competent evidence supporting a finding of such intent, the verdict of the jury will not be disturbed because there is some testimony tending to indicate there was no such fraudulent intent." *Beach v. State,* 28 Okla. Cr. 348, 230 Pac. 758.

Section 28-1212, Comp. St. 1929, does not contemplate restitution and is void of language that would even indicate any favorable subsequent action on the part of the maker of the note to correct his credit, or to disclose an understanding not previously made known to the payee. In *Beach v. State, supra,* it was also held: "The crime of obtaining money by means of the bogus check was completed at the time the check was uttered and passed, and the fact that

the defendant subsequently gave the prosecuting witness security for the debt owing him, by reason of this transaction, does not affect the question of his guilt."

In most of the cases where the intent to defraud has been decided in favor of the accused, the evidence has shown that he had an understanding with the payee, or the circumstances were such that he had established credit with the bank. In the instant case, no such arrangement was made or understanding had with the payee by the accused. To follow the line of reasoning adopted by the defendant, of his having acted in good faith, or that he had difficulty with his partners, but, upon discovering the fact that they would not assist him in paying the obligation, he tried to assist the payee in every way possible by selling the payee's live stock, to return some of the money, would not only violate the conception of this statute but would lead to innumerable complications in the enforcement of the law.

Defendant further contends that the trial court erred in failing to admit defendant's exhibit 16, consisting of several checks constituting the account of the Iowa Horse Sales Company in the Monmouth Trust & Savings Bank from the time the account was opened October 19, 1933, to June 6, 1934, when exhibit 1 was returned for insufficient funds. The state sought, on cross-examination of defendant, to elicit from him an admission that on previous occasions he had given a check without having sufficient funds, presumably in the state of Montana, when purchasing horses. This the defendant denied, and on redirect examination he offered exhibit 16, which was refused by the trial court. No prejudice resulted to defendant from the court's refusal to admit this exhibit in evidence. In any event, exhibit 16 would not prove or disprove intent to defraud, in so far as exhibit 1, the check in question, is concerned, and, furthermore, exhibit 16 would not be admissible unless it were shown by the evidence that the defendant had followed the usual course of business in dealing with his partners, as herein stated.

Defendant contends that the court erred in excluding

certain testimony of one Charlie Jones, who worked for defendant, who accompanied him to Grand Island at one time, and who, on occasions, had heard Houtchens tell the defendant that Woods would furnish all the money necessary to purchase horses. Mr. Jones did not testify to any facts which showed that defendant had any arrangement for credit with the bank, or to any facts which would bind the complainant, and such evidence was properly excluded.

Section 28-1212, Comp. St. 1929, in fixing the penalty, where the check so issued amounts to a sum greater than $35, provides that a person so convicted shall be fined not less than $100, nor more than $5,000, or be imprisoned in the penitentiary for not exceeding seven years, or both, at the discretion of the court.

Under the circumstances and the evidence in this case, we believe that section 29-2308, Comp. St. 1929, should be invoked on behalf of the defendant, and that the sentence should be modified to the extent that defendant be obligated to pay a fine of $100 and costs of this prosecution, and that the one-year sentence in the penitentiary of the state of Nebraska given by the trial court should be and it is hereby set aside.

With such modification of the sentence, the verdict and judgment of the trial court are affirmed.

AFFIRMED: SENTENCE REDUCED.

ROY WELSH, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

282 N. W. 385

FILED NOVEMBER 10, 1938. No. 30386.

1. **Waters.** Evidence outlined in opinion *held* insufficient to prove that the diversion dam and reservoir of defendant in the North Platte river in Keith county caused an ice jam which overflowed lands of plaintiff.
2. **Evidence.** "Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the is-

sue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734; *McGuire v. Kansas City Bridge Co.*, 132 Neb. 1, 270 N. W. 669.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Reversed and dismissed.*

Beeler, Crosby & Baskins and *Robert B. Crosby*, for appellant.

Beatty, Maupin, Murphy & Derry, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

This is a suit in equity for an injunction and for damages.

Roy Welsh, plaintiff, owns and operates a farm and cattle ranch about a mile in length on or along the south bank of the North Platte river six and one-half miles north and three-fourths of a mile or more east of Ogallala, Keith county. In addition to improvements, the ranch consists of 184 acres of deeded lands and approximately 180 acres of accreted lands in the form of islands or towheads extending lengthwise in the basin of the river which flows eastward.

Platte Valley Public Power and Irrigation District, defendant, is a public corporation with power to construct dams and to condemn lands for reservoirs in furtherance of the purposes indicated by its name. Three miles below plaintiff's ranch, defendant constructed across the North Platte river a concrete diversion dam 1,200 feet long and 9 feet higher than the bottom of the stream. The dam and dikes along the banks of the river create a reservoir extending westward approximately a mile and a half. The west end of the reservoir where it meets the flow of the river is about a mile and a half east of the east line of plaintiff's ranch. There are ample sluice gates for the passage of impounded waters and the ordinary flow of the river through the dam into the natural channel. Flood waters, if over 9 feet above the bottom of the river, run

over the crest of the dam. When the reservoir is full, open weir gates near the south end of the dam two and one-half feet below the crest divert river waters into a canal to defendant's Sutherland reservoir for the purposes of irrigation, power and light.

For the first time defendant began to impound water in the reservoir November 30, 1935, by closing the sluice gates. Between December 5 and 12, 1935, the accreted lands of plaintiff and a portion of his deeded lands were covered with water and ice.

In the petition it is alleged in substance, among other things, that the dam and the reservoir, under existing climatic conditions, caused a jam of slush ice which backed up the river beyond the premises of plaintiff, flooding his lands and thus causing damages. There is a further allegation that the wrongs of which plaintiff complains will be repeated unless he is protected by injunction for which he prays. He also prays for the recovery of damages for the total destruction of crops for the year 1935 and for the loss of the use of the flooded premises for 1935 and for 1936 prior to April as results of the flood in December, 1935. He enumerates the damages thus: Clover, grass and forage destroyed, $2,175; loss of shelter for cattle in brush and timber, $650; increased expense of moving cattle from flooded feed lot and feed and care elsewhere, $300; fencing loss, $100; stacked hay destroyed, $80; loss of the use of feed lot and consequent exposure of grain-fed cattle, $500.

In an answer pleading defenses in detail, defendant alleged it constructed and operated its diversion dam and reservoir pursuant to and under authority of law without any negligence whatever and denied that its completed and operated diversion project caused the ice jam or flood which submerged property of plaintiff three miles above the dam and a mile and a half above the west end of the reservoir. The alleged facts constituting defenses were put in issue by a reply containing a general denial.

The trial court found the issues in favor of plaintiff, enjoined defendant from so operating its dam and reservoir

as to flood plaintiff's land and rendered a judgment in favor of plaintiff for damages of $1,000. Defendant appealed from the judgment in its entirety and plaintiff took a cross-appeal from the judgment for damages as inadequate.

Defendant had authority to construct and operate its diversion dam. In construction and operation there was no negligence. Plaintiff so concedes. It is equally clear that in the normal and ordinary flow of the river the dam would not back water onto plaintiff's land. Defendant argues as ground of reversal, therefore, that the owner of a dam is not liable for damages caused by an ice jam which backs water onto lands of an upper riparian owner, if the dam would not have that effect in the usual and ordinary flow of the stream, citing cases. The applicability of this doctrine, if sound, to the present case need not be determined herein, if defendant did not cause or contribute to damages of which plaintiff complains.

The cause of the ice jam was a vital issue in the case. The decision below was adverse to defendant. The appeal presented the case for trial *de novo* without reference to the findings of the district court. Defendant relies on the rule of law stated to establish error, but that does not preclude examination of the evidence to ascertain, if possible, the controlling fact in the case. The burden was on plaintiff to prove by a preponderance of the evidence that defendant caused or contributed to the forming of the ice jam resulting in damages of which complaint is made. Did plaintiff make a case for injunction or damages? There was in fact in December, 1935, an ice jam in the North Platte river which backed up the stream westward far beyond the ranch of plaintiff. His accreted land and a few acres of his deeded land were submerged. Physical processes, phenomena and hydraulics are necessarily involved in the inquiry.

Plaintiff and other witnesses testified to their observations of the flooded area from different places and said in effect that there was a sheet of smooth ice on the water of

the reservoir and rough ice in the jam; that the slush ice and ice floes had formed in a river-wide jam of rough ice extending westward up the river from the west edge of the reservoir for miles beyond plaintiff's ranch; that slush ice and ice floes had lodged at or near the sheet of smooth ice on the reservoir and that still water, silt and smooth ice there caused the jam and resulting damages. This is the substance of testimony and the opinion expressed in voluminous detail by witnesses for plaintiff. A capable surveyor and hydraulic engineer testified to the same effect and expressed the opinion that freezing temperature, high water, deposits of silt, floating ice, obstruction of still water and smooth ice at the west edge of the reservoir combined to create the jam there that backed up the river several miles and inundated plaintiff's islands. On the issue as to the place and cause of the damaging ice jam, there is nothing in the record to indicate that witnesses for plaintiff did not testify conscientiously.

There is, however, testimony of a different import. There is evidence tending to prove that, before defendant's reservoir was constructed, plaintiff's island and towheads were subject to small ice jams and overflows but that none of them had ever equaled the flood in December, 1935. It was unusual. Plaintiff admitted on the witness-stand that his accreted land in the form of islands and towheads had been previously flooded and that flood water once ran through his meadow land without causing material damage.

In the instance under consideration, P. F. Conroy, a surveyor and engineer familiar with the North Platte river in Keith county, inspected the flooded area and surveyed it shortly after the flood, noting altitudes, distances and general conditions. His technical data shows that, at the east end of plaintiff's ranch, the river is 9 feet higher than the crest of defendant's diversion dam, and that farther up the river at the west end of plaintiff's ranch the river is more than 15 feet above the crest of the dam. Conroy testified to these and other obstructions, to physical facts, to observations and conditions indicating the location of

the ice jam that inundated lands of plaintiff. He expressed opinions to the effect that the jam which backed up on plaintiff's ranch was just east and immediately north of his lands; that it was caused by slush ice lodging on islands, towheads and other obstructions, thus turning the currents from regular channels toward the outer banks of the river and forming a jam across the river; that defendant's diversion dam had nothing to do with the flooding of plaintiff's land. Physical facts and conditions on which these opinions were based were stated in detail by the witness who gave reasons for his conclusions.

Eugene Halmos, designing engineer for defendant's diversion dam, also testified as an expert. He was obviously familiar with the work of its construction and of the surroundings. He considered the facts disclosed by the survey made by Conroy after the flood. He listened to witnesses who were of opinion that the ice jam that flooded lands of plaintiff formed at the west end of the reservoir, but was of opinion that a complete barrier across the river there was not possible in view of the established fact that water in vast quantities passed through the reservoir from the river during the entire flood. Halmos also expressed the opinion that the ice jam that caused the flow on plaintiff's land originated farther up the river at the west end of McGinley island and at plaintiff's accreted lands. The facts on which this opinion was based were stated by the witness in detail as shown by the survey and other evidence and surrounding circumstances. In support of his opinion he gave reasons that weakened expert testimony of a different import. The islands and towheads among the narrow channels of the river north of plaintiff's deeded land were natural obstructions. Slush ice and ice floes in the swollen stream would naturally reach those obstructions before floating ice would collide with the smooth sheet of ice on the reservoir two miles or more below. The evidence is that these islands were covered with ice. A rule of evidence reads as follows:

"Cogent reasons and circumstances that strengthen the

opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734; *McGuire v. Kansas City Bridge Co.*, 132 Neb. 1, 270 N. W. 669.

On the whole case, viewed in the light of the entire record, the evidence preponderates in favor of defendant on the vital issue. Plaintiff did not sustain the burden of proof on that issue or make a case for either injunction or damage. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

JAMES E. WEIR, APPELLEE, V. ORLEBAR D. SMITH, APPELLANT: MERNA SMITH ET AL., APPELLEES.
282 N. W. 260

FILED NOVEMBER 10, 1938. No. 30423.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. "On appeal from an order confirming a judicial sale in a suit to foreclose a mortgage, confirmation will not be set aside for inadequacy of price, where it is not so low as to evidence fraud or as to otherwise invalidate the sale, and where the evidence does not prove that a resale would result in a better price." *Commerce Trust Co. v. Bradley*, 125 Neb. 593, 251 N. W. 174.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Butler & James, for appellant.

J. F. Fults, contra.

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an appeal from an order of confirmation of sale of real estate entered in a real estate mortgage foreclosure proceeding. The premises involved consist of a 240-acre farm. The appellant, Orlebar D. Smith, executed the mort-

gage and notes secured by the same in October, 1934, and since that date has paid neither the interest accruing on his loan nor the taxes assessed on the mortgaged property. The taxes unpaid and due for the years 1934 to 1936, inclusive, at the date of this hearing amounted to the sum of $262. The decree of foreclosure was entered on December 15, 1936, for $2,697.09, with interest at 8 per cent. from date, and carries costs. On November 15, 1937, the mortgaged premises were sold under this decree for the sum of $2,800. A hearing was had on objections to confirmation on the 31st day of January, 1938, which, on that date, were overruled, and the sale confirmed; the finding of the trial court being that "the sale proceedings were regular and that the property sold for its fair and reasonable value under the circumstances and conditions of sale, and that if offered for sale again at this time would probably not bring any greater sum and that the defendants have no equity in said premises."

The sole contention presented here is that the mortgaged premises did not sell for a fair price and that the amount bid at the sale by the plaintiff was wholly disproportionate to the fair and reasonable value of the premises. At the hearing the appellant presented three witnesses whose testimony as to valuation may be placed at $4,800, $5,000, and $4,800. The witnesses for plaintiff testified as to values of $17.50 an acre, $17 to $18 an acre, and $15 to $20 an acre. But there is a total lack of testimony that if resold the mortgaged premises would bring a better price. At the time of confirmation, there was due on the decree the sum of $2,940. In addition, outstanding unpaid taxes amounted to $262. In this situation we are required to sustain the action of the trial court.

"On appeal from an order confirming a judicial sale in a suit to foreclose a mortgage, confirmation will not be set aside for inadequacy of price, where it is not so low as to evidence fraud or as to otherwise invalidate the sale, and where the evidence does not prove that a resale would result in a better price." *Commerce Trust Co. v. Bradley,*

125 Neb. 593, 251 N. W. 174. See, also, *Lemere v. White*, 122 Neb. 676, 241 N. W. 105; *Wallace v. Clements*, 124 Neb. 691, 248 N. W. 58.

The judgment entered by the district court is, therefore,

AFFIRMED.

THOMAS A. MICEK, APPELLEE, V. OMAHA STEEL WORKS, APPELLANT.

282 N. W. 262

FILED NOVEMBER 10, 1938. No. 30479.

1. **Workmen's Compensation.** The mere fact that after the injury the employee receives as wages a larger sum than his former remuneration does not necessarily preclude recovery of compensation under the terms of the Nebraska workmen's compensation statutes.
2. **Evidence** examined, and *held* to sustain the judgment of the district court, except as to the sum of $36, as to which amount such judgment is determined to be excessive.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. *Affirmed as modified.*

Clarence T. Spier and *Arthur C. Bailey*, for appellant.

Reeder & Reeder, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a compensation case, and is presented here as an appeal from a judgment of the district court for Platte county awarding compensation to appellee as being totally and permanently disabled.

The record discloses that on February 14, 1933, appellee Micek was in the employ of appellant, Omaha Steel Works, and was engaged as a common laborer in the construction of a bridge over the Loup river at Columbus, Nebraska. Then and there being in the performance of his duties, and in the course of the regular business of appellant, claimant

Micek accidentally fell from the bridge upon which he was working, and suffered a compression fracture of the first lumbar vertebra, and as a result of this fracture he suffered a traumatic spinal cord lesion resulting in permanent impairment of the nerves leading to the bowels, the sphincter muscles of the rectum and bladder, causing a partial permanent loss of the functions of said organs. Further, owing to the physical condition, due to the weakened and impaired condition of his back and spine, plaintiff has suffered a permanent disability within the meaning of the Nebraska workmen's compensation act.

It appears, without question, that at the time of the accident he was employed as a common laborer, at the rate of 30 cents an hour, and the work on which he was engaged was a federal aid project, and under the limitations of his employment he was limited to 30 hours a week. Under these circumstances, this court has determined that plaintiff's wages must be taken as $9 a week for the purposes of the Nebraska workmen's compensation act. *Drum v. Omaha Steel Works,* 129 Neb. 273, 261 N. W. 351.

It is shown that, prior to accepting employment with the appellant, Micek had been regularly employed by the Union Pacific Railroad Company as a bridge carpenter until shortly before he took this job with appellant, and was paid 68 cents an hour by such railroad company; that his lay-off by the railroad company was temporary and due to the depression; that his duty with the steel works, as also his prior employment by the railroad company, was necessarily made up of work requiring the performance of heavy lifting and hard, manual labor. It fairly appears that this nature and class of work, because of his injuries, is now impossible for him to perform, and that this disability is permanent.

In its judgment of June 6, 1938, the district court found that, by reason of the foregoing, the plaintiff has been totally and permanently disabled from engaging in any sort of common labor similar to that of his employment when injured, and correctly awarded compensation to plaintiff on this basis.

Appellant challenges the correctness of the basis on which this award proceeds. It contends that the unquestioned fact is that since April 1, 1935, plaintiff has been employed as a bartender at a compensation of $17 a week, which is inconsistent with a condition of total and permanent disability.

As a matter of law, this contention cannot be sustained. "If the employee's physical efficiency has been substantially impaired, the fact that he is employed at the same work, or at the same or higher wages, will not as a general rule disentitle him to compensation, unless it is expressly so provided in the act under which the claim is made." 2 Schneider, Workmen's Compensation Law (2d ed.) 1340, sec. 402.

The annotator in a note to *Woodcock v. Dodge Bros.*, 17 A. L. R. 203 (213 Mich. 233, 181 N. W. 976) states the general rule on this subject in the following language: "The rule appears to be that the mere fact that after the injury the employee receives, or is offered, his former wages, or a larger sum, does not necessarily preclude recovery of compensation under the various workmen's compensation statutes." He cites, as sustaining this principle, authorities from nine state jurisdictions, and also English and Scotch cases.

In the application of this doctrine, in *Epsten v. Hancock-Epsten Co.*, 101 Neb. 442, 163 N. W. 767, Rose, J., says, in part: "For any other partial disability, compensation is to be determined by proof of impairment of earning power. If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury." See, also, *Hanley v. Union Stock Yards Co.*, 100 Neb. 232, 158 N. W. 939.

Supporting this conclusion, in principle, are the following cases: *Woodcock v. Dodge Bros.*, 213 Mich. 233, 181

N. W. 976; *London Guarantee & Accident Co. v. Industrial Commission,* 70 Colo. 256, 199 Pac. 962; *Burbage v. Lee,* 87 N. J. Law, 36, 93 Atl. 859; *De Zeng Standard Co. v. Pressey,* 86 N. J. Law, 469, 92 Atl. 278; *Gailey v. Peet Bros. Mfg. Co.,* 98 Kan. 53, 157 Pac. 431; *Sauvain v. Battelle,* 100 Kan. 468, 164 Pac. 1086.

In his present employment as a bartender, plaintiff sells drinks and bottled goods, but does no heavy work. He is employed in a small business which affords him opportunity for resting from time to time. His condition is such that even customary light labor of a continuous nature is an impossibility for him. As summarized in appellee's brief, the requirements for the position now held by Micek may be said to be: "Under our law the dispenser of intoxicants is charged with definite responsibilities. He must be mentally alert and exercise diplomacy and tact. He must be familiar with his merchandise and be skillful in the art of mixing beverages. Above all, he must be honest and reliable in his dealings with his employer's money. He must have a pleasing personality and make an effort to win friends and attract trade."

It is quite obvious that plaintiff's present employment, where the performance of hard, manual labor is excluded by the necessities of the situation, may not be said to be common labor, and plaintiff, as now employed, may not be said to be a common laborer. With his nervous system seriously affected, with his regular weight reduced from approximately 180 to 145 pounds, and a permanent condition in his spine and back which has continued now for three years preventing the performance of common labor or the work of a railway bridge carpenter, or work of a similar nature or character, and the permanent continuance of which is fairly established by the evidence, it is obvious that Micek is entitled to a full award of compensation to the extent of disability which he has sustained. In this connection the term here employed—"disability"—has been aptly defined in these words: The term "disability" is not restricted to such disability as impairs present earning

power at the particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members, in the ordinary pursuits of life. *Burbage v. Lee*, 87 N. J. Law, 36, 93 Atl. 859. Notwithstanding the receipt of wages by claimant, we are quite of the opinion that, under the facts established by this record, plaintiff is entitled to an award for permanent total disability as made and entered by the trial court. *Ludwickson v. Central States Electric Co., ante*, p. 371, 281 N. W. 603; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254. However, we also find that the sum of $48 taxed against appellant by the district court is excessive to the extent of $36, and is so conceded by appellee. This fact necessarily precludes the allowance in this court of an attorney fee for plaintiff.

The judgment of the district court is, therefore, modified to the extent of reducing the decree entered in the sum of $36, and, as thus modified, is, in all things, affirmed.

AFFIRMED AS MODIFIED.

LAURA DEDERMAN, APPELLEE, V. CLAUDE SUMMERS, APPELLANT.

282 N. W. 261

FILED NOVEMBER 10, 1938. No. 30366.

1. **Negligence.** "Negligence on the part of a husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car." *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87.
2. **Appeal.** A verdict of a jury in a law action based on conflicting evidence will not be disturbed on appeal unless clearly wrong.
3. **Automobiles: COLLISION: EVIDENCE.** Physical facts dependent upon conflicting evidence do not demonstrate that verdict is so clearly wrong that it should be set aside.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

M. S. McDuffee and *R. J. Shurtleff*, for appellant.

Moyer & Moyer, contra.

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

DAY, J.

This is an action for damages by the wife of the driver of one of two cars which had a collision on Sunday, December 15, 1935. The plaintiff, with her husband and three children, was traveling from her home to attend church at Norfolk. The road was covered with snow which had just fallen and the cars were making the first or at least the second track upon the highway.

The highway extended east and west and the Dedermans were going from the west to the east. The collision occurred almost opposite the farm of Arnold Houfek, near the top of a hill. Neither driver was aware of the other's approach prior to the collision. Mrs. Dederman claims to have sustained injuries, the severity and permanency of which are not questioned. The case was tried to a jury who returned a unanimous verdict in favor of the plaintiff against the defendant in the sum of $2,500.

Laura Dederman was the wife of Fred Dederman, the driver of one of the cars. It has long been established in this state: " 'Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state.' " *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586, 150 N. W. 648. This court held in *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87: "Negligence on the part of a husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car." There is no evidence that the wife was more than a passenger in this car.

The evidence is conflicting as to the negligence of Summers, the driver of the other car. The evidence was prop-

erly submitted to the jury and the verdict resulted. A verdict of a jury in a law action based on conflicting evidence will not be disturbed on appeal unless clearly wrong. However, the appellant contends that the verdict is clearly wrong because the physical facts are such as would make it impossible for the accident to have occurred as the result of the negligence of Summers.

A brief summary of the evidence shows that the physical facts depend upon evidence that is disputed. Hynek, dairyman, testified that he had driven the first car over the road after the snow making the tracks, the left of which was about 6 to 8 inches from the center of the road. Dederman testified that they followed the tracks up to the time of the collision. Houfek, near whose farm the collision took place, and who went to the scene immediately afterwards, testified that Summers had said he could have avoided the accident had he seen the Dederman car.

Wolf, the garage man, who went to the scene of the accident a short time after the collision, testified from his examination of the tracks as to how the accident happened. The controversy seems to be as to who was on the wrong side of the road. Each supported by witnesses claims that the other was on the wrong side of the road. One must be mistaken because, obviously, if each had been on the right side of the road, the collision would not have occurred.

The evidence in regard to physical facts is very much in dispute. It is only where the undisputed facts demonstrate that the collision was not caused by the negligence of the defendant that the verdict can be said to be clearly wrong. *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514. Some time ago this court held that, for physical facts to destroy direct and positive testimony showing contributory negligence, they must be so conclusive as to require direction of a verdict for defendant. *Britt v. Omaha Concrete Stone Co.,* 99 Neb. 300, 156 N. W. 497.

An examination of the record does not disclose any error in the proceedings, and the judgment of the district court is

AFFIRMED.

HYMEN ZELEN, APPELLANT, V. DOMESTIC INDUSTRIES, INC., APPELLEE.

282 N. W. 387

FILED NOVEMBER 10, 1938. No. 30391.

1. **Evidence.** The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement as a condition on which the performance of the written contract is to depend does not apply where the written contract is unambiguous and complete in itself, and expresses a contractual consideration.
2. **Contracts.** When the plaintiff has breached his contract with the defendant, the defendant may cancel the contract and treat it as void without subjecting himself to liability for damages.
3. ———. A contract for the sale of goods must obligate the seller to deliver, and the buyer to accept, a definite quantity of the goods, or the contract is lacking in mutuality and therefore void.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Mockett & Finkelstein, for appellant.

Stewart, Stewart & Whitworth, contra.

Heard before ROSE, C. J., EBERLY, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action for damages for an alleged breach of contract entered into on March 1, 1932, between the plaintiff, Hymen Zelen, doing business under the trade-name of Western Electric Supply Company, and the defendant, Domestic Industries, Inc., a nonresident manufacturing corporation. At the close of plaintiff's evidence, the trial court directed a verdict in favor of the defendant and plaintiff appeals.

This is the second appearance of this case in this court, the former opinion appearing in 131 Neb. 123, 267 N. W. 352.

Under the terms of the contract entered into by the parties, the Western Electric Supply Company agreed to act

as the sole distributor of Buckeye electric refrigerators within the state of Nebraska, the defendant being the manufacturer thereof. Plaintiff further agreed to purchase 1,000 refrigerators at the price fixed by the contract for delivery in monthly quantities of not less than 100 from March to October of 1932, the terms of sale being sight draft with bill of lading attached, f. o. b. Columbus, Ohio.

On March 12, 1932, defendant shipped one car-load of refrigerators and forwarded a sight draft with the original bill of lading attached to the First National Bank of Lincoln for collection. Plaintiff refused to honor the sight draft, claiming that an oral agreement had been made previous to the signing of the written contract to the effect that plaintiff was not to be held to the quantity of refrigerators set out in the contract and that any refrigerators shipped were to be on open account and not by sight draft with bill of lading attached. After considerable correspondence, defendant waived the provision of the contract requiring plaintiff to honor the sight draft and released the car-load of refrigerators to the Union Terminal Warehouse Company, to be held by it subject to the order of the Western Electric Supply Company upon payment of the contract price of the refrigerators as they were removed from the warehouse.

On April 8, 1932, plaintiff ordered a second car of refrigerators and asked that they be shipped to the Union Terminal Warehouse Company, the same as before. Defendant again waived the terms of payment provided in the contract and shipped the refrigerators to the Union Terminal Warehouse Company. Plaintiff did not order any more refrigerators and on June 14, 1932, defendant canceled its contract with the plaintiff because of plaintiff's failure to take refrigerators in accordance with the quota contained in the contract.

Plaintiff contends that the court erred in sustaining objections to oral conversations had between the plaintiff and the agents and officers of the defendant company, which purported to show the inducements held out to plaintiff to obtain his signature to the contract. A reformation of the

contract was not sought. Fraud in obtaining the contract was not pleaded. The contract was completed and unambiguous. The applicable rule is that parol evidence of prior or contemporaneous agreements is not admissible to vary or contradict the terms of a complete and unambiguous written contract. *Weidenfeld v. Olson,* 132 Neb. 303, 271 N. W. 806. The trial court was correct in its ruling on this point.

The evidence discloses an express waiver by the defendant of the terms of sale of the first two car-loads of refrigerators shipped. The plaintiff ordered and received 75 refrigerators from defendant during March, 1932, his contract requiring him to take and pay for 100. The second car-load was shipped in April and contained 75 refrigerators, plaintiff's contract requiring him to take 150 during that month. Plaintiff failed to take any refrigerators in May, his contract requiring him to take 200 during that month. No refrigerators were ordered prior to June 14, 1932, the date of the cancelation of the contract by defendant. We have searched the record and have been unable to find any evidence of a waiver of the amount of refrigerators to be delivered under the contract. The contract itself provides: "You may cancel any monthly schedule or the entire order, however, this is only cancelable by your giving us thirty days notice before shipment is to be made. In the event that such cancelations are made, we have the privilege at our option to eliminate the exclusive arrangements in this territory or cancel the entire arrangements with your company." No notice was ever given in accordance with the above provision. If the notice had been given, defendant could, at its option, cancel the contract. Can it be said that the failure to give the notice can place the plaintiff in any better position? We think not. The contract by its terms makes the delivery and acceptance of the refrigerators according to the quota accompanying the contract an express obligation on the part of the plaintiff. Clearly plaintiff breached his contract in failing to receive and pay for the number of refrigerators called for in the contract. The

defendant therefore was acting within its legal rights when it canceled the contract.

But even if the contention of plaintiff was true that the agreement had been modified so as to eliminate the number of refrigerators to be purchased, still plaintiff could not recover, the applicable rule being: Where defendant agrees to supply plaintiff with certain merchandise to the extent that plaintiff may require, but plaintiff did not obligate himself to purchase any of such merchandise, the transaction between the parties does not constitute an enforceable contract, it being analogous to an option without consideration and it could be rescinded at any time. *Gross v. Stampler,* 165 N. Y. Supp. 214; *McAllister Lumber & Supply Co. v. Eldora Resort & Power Co.,* 51 Colo. 91, 116 Pac. 1038; *George W. Jennings, Inc., v. Hirsch Rolling Mill Co.,* 242 S. W. (Mo. App.) 1003.

We necessarily conclude that the trial court was right in directing a verdict for the defendant. The judgment is

AFFIRMED.

MARY HALEY, APPELLEE, V. WILLIAM C. DEER, APPELLANT.
282 N. W. 389

FILED NOVEMBER 18, 1938. No. 30415.

1. **Negligence.** The law places those who come upon the premises of another in three classes: Briefly defined, invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter.
2. ———. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but a licensee takes the premises as he finds them, for the only duty of the occupier to a licensee is to give notice of traps or concealed dangers.
3. ———. A person going into a store to use a pay telephone maintained for the use of its customers is an invitee.
4. ———. If one goes into a store to use a pay telephone, and while there uses toilet facilities provided for its customers, and

while returning from the toilet falls through an unguarded and unlighted trap-door opening to the basement, reasonable damages for her injuries may be recovered.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Fred C. Foster, for appellant.

Allen, Requartte & Wood and *James L. Brown, contra.*

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

This is an action for personal injuries sustained by plaintiff by a fall into the basement at the Gold Dust Tavern, located at the corner of Ninth and O streets in Lincoln, Nebraska. At the close of plaintiff's evidence defendant moved the court to direct a verdict in his favor, thereupon the plaintiff also moved for a directed verdict. After argument the trial court discharged the jury and entered a judgment in favor of the plaintiff and against the defendant, William C. Deer, for $2,400 and costs. Defendant appeals.

The plaintiff is a widow, aged 64 years at the time of the trial. On March 7, 1936, she was in the Gold Dust Tavern, in which meals are served and drinks furnished, for about three-quarters of an hour between 3 and 4 o'clock, with her sister-in-law and niece, during which time the plaintiff had a lunch and a glass of beer, this being a family tavern, patronized by many older townspeople. She wanted to use a pay telephone that was there, and the young man showed her how to drop the nickel in and use the telephone. While she was there in the afternoon she saw other women, who were customers there, go back to the ladies' toilet, indicated by a sign on the wall.

After leaving the Gold Dust Tavern, she shopped awhile and then went to Gold's store to buy a dress for her granddaughter, then decided to look further before purchasing, and started down to the Golden Eagle store. However, she decided to telephone to a relative first to come for her, as it

was about 6 o'clock in the evening, and went on to the Gold Dust Tavern for that purpose. The defendant, Deer, gets 25 per cent. of the excess tolls above $5.50 a month from this pay telephone in his tavern. Plaintiff decided, when in the tavern, to use the facilities of the ladies' toilet in the back part of the room. She went back through a short, narrow hallway, as directed by a large sign on the wall, which said, "Ladies' Toilet." Coming out of this toilet, it was quite dark, as the light in the passageway had not been turned on. She missed the turn to go north to the main front room, and, going straight ahead for a few steps as she came out of the door of the ladies' toilet, she fell through an opening in the floor which led to the basement. She recovered consciousness at the St. Elizabeth Hospital, where she remained for some three weeks. Her back and whole right side were injured, but the most serious injury was to the right side of her head, beginning about in the temple and tearing her ear, requiring many stitches, and after long surgical treatment a part of the ear was saved.

The defendant relies upon the following errors for reversal: That the judgment is not supported by the evidence, and is contrary to the evidence and the law; admission of evidence over the objection of the defendant, and for excessive damages appearing to have been given under the influence of passion or prejudice.

The principal argument of the defendant is that plaintiff entered the defendant's place of business solely for her own convenience or benefit, and was a bare licensee, and the defendant owed her no duty except to refrain from wilfully or wantonly inflicting injury upon her, and cites several cases in support of this contention.

In one of these cases, the customer left the store because she was not waited upon promptly, and it was held that she was negligent in not looking where she was walking, and a verdict in favor of the defendant was affirmed in *Mullen v. Sensenbrenner Mercantile Co.*, 260 S. W. (Mo.) 982, 33 A. L. R. 176. This case is followed in the A. L. R. by a long annotation, with citations from federal and state

courts, in which is cited the case of *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190, in which it was held that a proprietor is only bound to exercise reasonable care and prudence to keep the premises to which the public is invited safe for that purpose, and the fact that the customer falls upon a stairway does not in itself raise any presumption of negligence.

The defendant also relies upon the case of *Wright v. Salvation Army*, 125 Neb. 216, 249 N. W. 549, in which it was held that one who walks into an open elevator shaft without looking to see whether the elevator has been moved is guilty of gross contributory negligence and cannot recover. But in this case he had been there upon many occasions for the purpose of buying rags. He was in a part of the building which was not open to the public. There were warning signs, marked "Danger" and "Elevator." He does not claim that he had ever been given permission to cross the elevator to go to the rag room, and our court stated definitely that the injury in this case occurred when the plaintiff exceeded his invitation and attempted to go where he had no permission to go.

We are also cited by the defendant to the case of *Kruntorad v. Chicago, R. I. & P. R. Co.*, 111 Neb. 753, 197 N. W. 611, in which upon motion the case was taken from the jury and a judgment directed for the defendant. Plaintiff was descending a stairway erected on an embankment by the defendant company, and one of the steps gave way and plaintiff was injured. It was held by this court that the defendant was under no legal obligation to keep the stairway in a safe condition, for, while a license was implied to use the same, it was for the convenience and benefit of the person using it, with no common interest or mutual advantage, and therefore the plaintiff was a bare licensee.

In *Wall v. F. W. Woolworth Co.*, 209 Ky. 258, 272 S. W. 730, a customer, in assisting a clerk to untangle a clothesline, stepped around the counter and through a small swinging gate, where she fell down a stairway, inflicting injuries. The customer, therefore, was not within the area of the

store set apart for the use of customers. The court said the customer was at that time either a trespasser or a licensee. Verdict for defendant affirmed.

Defendant relies upon the case of *Herzog v. Hemphill,* 7 Cal. App. 116, 93 Pac. 899, in which case the plaintiff's intestate came to his death while showing another through a dark hallway from a tamale stand to a urinal which was not for the use of the patrons of the tamale stand. Held, the deceased was a mere licensee.

The defendant's cases support the contention that, where one solely for his personal pleasure, convenience, or benefit enters upon the premises of another, with his consent but without an invitation, express or implied, he is a bare licensee, and the occupier of the premises owes no duty to him save to refrain from wilfully or wantonly inflicting injury upon him.

In *Collins v. Sprague's Benson Pharmacy,* 124 Neb. 210, 245 N. W. 602, the customer asked to use toilet facilities which were there solely for the convenience of the employees, and not for customers. But in the case at bar, we believe that the plaintiff was more than a mere licensee.

The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers. Toward trespassers the occupier need only refrain from wilful or wanton injury as modified by the "attractive nuisance" line of cases. See 20 R. C. L. 69, sec. 60.

We will now examine cases closely in point with the case at bar. In *Dowling v. MacLean Drug Co.,* 248 Ill. App. 270, the plaintiff was an invitee upon the premises of the defendant in its drug store, having gone there for the pur-

pose of using a public pay telephone. She fell over the base of a weighing machine which was on the floor, and sustained an injury. While she saw the scale, which was obvious to her, she did not see nor anticipate that the base of it protruded into the aisle. It was not failure to exercise due care on her part to assume that there was no obstruction in her path. She was walking along the passageway, upon which patrons in the store were invited to walk on their way to the telephone booths. The law does not charge one with anticipating dangerous and negligent conditions, but *he may assume that others have done their duty to give proper warning of hidden dangers.* The second syllabus in this case is: "A person going into a drug store to telephone from a booth maintained by the proprietor is an invitee."

In *Main v. Lehman,* 294 Mo. 579, 243 S. W. 91, the toilet in defendant's store was allowed to be used by his customers as well as his employees, and plaintiff, a customer, asked an employee where the customers' toilet was, and was told it was on the third floor and how to reach it, and it was held that plaintiff was not a mere licensee, but an invitee.

In *MacDonough v. F. W. Woolworth Co.,* 91 N. J. Law, 677, 103 Atl. 74, the plaintiff entered a store with a vague purpose of buying something if she saw anything that took her fancy. There was a book-rack, of five shelves about four feet long, filled with books, the sign above saying that any book could be bought for ten cents. There was a dim electric light six inches above the bookcase, and in order to read the titles it was necessary to enter the passageway, from which she fell down a stairway, which she did not see. The gate to the stairway was tied open with a string. Judgment for plaintiff affirmed.

Our court has said: "Storekeeper who places racks of merchandise about a railing around a stairway to basement so as to obstruct the view of customers is negligent." *Rogers v. Penney Co.,* 127 Neb. 885, 257 N. W. 252.

In *Gibeson v. Skidmore,* 99 N. J. Law, 131, 122 Atl. 747,

an assistant to the librarian hung her coat and hat upon hooks in an adjoining storeroom rented from the library, the hooks being above a trap-door. When she went to get them, the owner of the property had without her knowledge raised the trap-door and left it open, and she fell through such opening, sustaining injury. A judgment for the defendant was reversed, and it was held that an owner of premises who, by express or implied invitation, induces persons to make use of the premises is under a duty to exercise ordinary care to render such premises reasonably safe for such purpose. See, also, *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811.

If one goes into the store of another to use a pay telephone, and while there uses the toilet facilities provided for customers, she has the rights of an invitee, and the owner is liable if he leaves an unguarded, unlighted opening into the cellar which would ordinarily be closed by a trap-door, and the danger of which opening is well known to the owner but not to the invitee. A case somewhat in point is that of *Glaser v. Rothschild,* 221 Mo. 180, 120 S. W. 1, 22 L. R. A. n. s. 1045.

A customer of a place of business retains the status of an invitee while going to or returning from a toilet maintained for the use of customers.

It is not necessary to cite additional cases, for hundreds of them may be found in the annotations in 33 A. L. R. 181, 43 A. L. R. 866, 46 A. L. R. 1111, 58 A. L. R. 136, and more than 50 pages of the later cases appear in the excellent annotation, 100 A. L. R. 710, where many exactly in point may be found.

We find no prejudicial errors in the admission of evidence over the objections of the defendant. The plaintiff, in the loss of nearly all of an ear, and other facial injuries, will be disfigured for life, and the other injuries she suffered were serious. The trial judge, who saw the plaintiff and listened to the testimony, fixed her recovery at $2,400. This judgment does not seem to the court to be excessive, and the same is hereby

AFFIRMED.

HARRY KUWITZKY, APPELLANT, V. JOSEPH O'GRADY, WARDEN OF STATE PENITENTIARY, APPELLEE.
282 N. W. 396

FILED NOVEMBER 18, 1938. No. 30487.

1. **Habeas Corpus.** The application for a writ of habeas corpus is the proper procedure to review the sentence under count two of the information, the sentence under count one having been served in full.
2. **Criminal Law.** The habitual criminal provision (Comp. St. 1929, sec. 29-2217) does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.
3. ———. Habitual criminality is a state, not a crime, and warrants greater punishment because of past conduct.
4. **Habeas Corpus.** Appellant, being unlawfully imprisoned, without due process of law, is entitled to his release and discharge.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Reversed.*

Robert A. Nelson and *Palmer McGrew,* for appellant.

Richard C. Hunter, Attorney General, and *Bert L. Overcash, contra.*

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

Application by Harry Kuwitzky for a writ of habeas corpus, alleging that his sentence for ten years to the state penitentiary, under the second count of an information charging him with being an habitual criminal, is null and void, for which reason he prays to be discharged and restored to his liberty. A hearing was had in the district court, evidence produced and case argued and submitted to the court, and writ of habeas corpus denied and application dismissed. Appellant's motion for new trial was overruled.

There is no dispute as to the facts in this case. On May 29, 1934, the county attorney of Otoe county filed an information against the appellant herein for burglary of a

storehouse in Otoe county on March 19, 1934. In the second count of the information the county attorney charged that on October 8, 1918, the appellant was convicted of the crime of car stealing in Otoe county and sentenced to a term of not less than one year nor more than seven years, and that on June 7, 1920, the appellant was convicted of the crime of burglary in Otoe county and sentenced to the penitentiary for not less than one year nor more than ten years; that on October 20, 1924, appellant was convicted of the crime of burglary in Otoe county and sentenced to the penitentiary for a term of not less than three years nor more than ten years; that on July 8, 1931, the appellant was convicted of the crime of burglary in Otoe county and was sentenced to the penitentiary for a term of three years, and that by reason thereof the said Harry Kuwitzky, appellant, is an habitual criminal, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Nebraska; that on the same day the information was filed the appellant was taken before District Judge Livingston, waived time to plead, was duly arraigned, and entered a plea of guilty to each count in said information. He was thereupon sentenced to serve a term of five years in the state penitentiary (he being a second offender) on the first count of said information, and in addition, upon his plea of guilty to the second count, he was sentenced to serve a term of ten years in the state penitentiary, and it was further ordered that these sentences run concurrently. It is further set out that the next day, to wit, May 30, 1934, the appellant was delivered by the sheriff of Otoe county to the warden of the state penitentiary at Lincoln, Nebraska.

It was stipulated by the parties that the appellant has served his first sentence of five years given under the first count of the information, and that upon the day of the hearing, to wit, May 14, 1938, he has also served two months and 16 days of the sentence given under the second count of the information, and that he is now being held and detained in the penitentiary under the sentence given under

his plea of guilty to the second count of the information.

The sole and only question presented to this court for determination is whether or not his detention in the penitentiary at this time is lawful.

The application for the writ of habeas corpus may not be brought until a legal sentence has been served. *In re Schwartz,* 1 Cal. App. (2d) 401, 36 Pac. (2d) 445; *In re Miller,* 133 Cal. App. 228, 23 Pac. (2d) 1034.

No complaint is made but that the crime of burglary was properly set out in the first count, and upon his plea of guilty thereof his sentence of five years to the penitentiary was proper, and his term of service under that sentence by reason of his good behavior has now terminated.

The application for a writ of habeas corpus is now the proper procedure for the review of the judgment in the case at bar, under sections 29-2301 to 29-2316, Comp. St. 1929. *In re Resler,* 115 Neb. 335, 212 N. W. 765.

Each separate count of an information charges the defendant with a separate and distinct crime, and he may be acquitted on a count charging one crime and convicted on a count charging another crime. *George v. State,* 59 Neb. 163, 80 N. W. 486; 14 R. C. L. 196, sec. 41.

We will now consider the second count of the information, which was based upon section 29-2217, Comp. St. 1929, reading in part as follows: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern."

Mr. Justice Hughes, in rendering the opinion in *Graham v. State of West Virginia,* 224 U. S. 616, said: "The pro-

priety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts. *Ross's Case,* 2 Pick. (Mass.) 165, 170; *Plumbly v. Commonwealth,* 2 Met. (Mass.) 413, 415."

The Penal Code of Montana provides that ten years may be given to an habitual offender. In the case of *State v. Connors,* 27 Mont. 227, 70 Pac. 715, that court considered a sentence of five years for assault and five years for prior conviction of a felony, making the full term ten years. Upon this sentence being brought to the supreme court, that court found that the trial court manifestly intended to sentence the defendant for a term of ten years for assault in the second degree. However, in the case at bar no such question can arise, for the sentence was definitely to ten years upon count two of the information.

When the same question arose in Oklahoma, the court said: "Allegation of previous conviction is not a distinct charge of crime, but is necessary to bring the case within the statute, and goes to the punishment only." *Ex parte Wray,* 61 Okla. Cr. 162, 66 Pac. (2d) 965. "Judgment of conviction for 'habitual criminal' under information charging petit larceny as a second offense after prior conviction *held* void, entitling accused to habeas corpus, since there was no such offense as 'habitual criminal.'" *Ex parte Wray,* 66 Pac. (2d) 965 (61 Okla. Cr. 162).

An habitual criminal statute is sound in principle and sustained by reason. The legislature may well enact such a law to permit law enforcement officers to take into consideration the persistence of an offender in his criminal course. That the defendant has been guilty of a second

felony does not make him guilty of an offense for which he may be separately sentenced, but, upon proof that the habitual criminal statute applies to his case, he may have his punishment for the last felony of which he has been convicted increased as provided by law. 8 R. C. L. 271, secs. 284, 285; *Mundon v. State,* 196 Wis. 469, 220 N. W. 650; *State v. Zywicki,* 175 Minn. 508, 221 N. W. 900. Our Nebraska court has said: "Where, under a prosecution for felony, the state seeks to have the accused punished as an habitual criminal under section 10177, Comp. St. 1922, it is proper to allege in the information and prove upon the trial that the accused has been previously convicted as provided in said section." *Taylor v. State,* 114 Neb. 257, 207 N. W. 207. See, also, *Booth v. State,* 122 Neb. 544, 240 N. W. 753.

Provisions for increasing the punishment for habitual criminals are found in the laws of nearly every state. In a few states the law may be so phrased as to require the filing of a supplemental information to present an issue of fact to be determined by a jury, first, as to the identity of the defendant, and, second, as to his former conviction and the execution of the sentence. In other states it presents a question of fact for the purpose of increasing the length of the sentence which may be imposed upon conviction of the felony. The two annotations, of great length, found in 58 A. L. R. 20 and 82 A. L. R. 345, give an exhaustive discussion of the various phases of the question, with citations from the various states.

The federal courts have often been called upon to pass upon these laws when applications have been made for writs of habeas corpus.

In a recent case from the circuit court of appeals for the seventh circuit, the court used this language: "Habitual criminality is a state, not a crime. * * * Habitual criminal statutes, such as that of Indiana, do not create or define a new or independent crime, but they prescribe circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities as

they are alleged and found. This was definitely decided in *Barr v. State,* 205 Ind. 481, 187 N. E. 259. In *McDonald v. Massachusetts,* 180 U. S. 311, 21 Sup. Ct. Rep. 389, 390, 45 L. Ed. 542, the court, in considering a statute imposing greater punishment because of prior convictions for crimes, said: 'The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only.' " *Goodman v. Kunkle,* 72 Fed. (2d) 334.

Let us examine our statute. We find that chapter 28, Comp. St. 1929, is entitled, "Crimes and Punishments." In it we find 56 pages setting out at length all crimes, beginning with "homicide" and ending with "stealing a ride on a train." The section on "habitual criminal" is not in that chapter, but is section 2217 of chapter 29, entitled "Criminal Procedure," in which the law relating to the arrest, extradition, indictments, pardons and paroles, and sentences of wrong-doers is found.

We are of the opinion that count 2 of the information filed in Otoe county against the appellant in the case at bar did not charge a separate and distinct offense under the laws of Nebraska; that the previous convictions on several felonies alleged therein would, if proved, show the appellant to be an habitual criminal, and permit his punishment for the act of burglary charged in count 1 to be increased, but that the trial court was without authority to render a distinct, separate judgment and sentence upon count 2 of said information, as was done.

The appellant is, therefore, being unlawfully imprisoned without due process of law, and is entitled to be released and discharged. The denial of the trial court of a writ of habeas corpus is hereby

REVERSED.

RICKA WINTERSON, APPELLANT, V. PANTEL REALTY COMPANY, APPELLEE.

282 N. W. 393

FILED NOVEMBER 18, 1938. No. 30362.

1. **Judgment.** A judgment notwithstanding the verdict can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment.
2. **New Trial.** If the trial court is of the opinion that it erred in submitting the case to a jury and should have directed a verdict for the defendant because of the insufficiency of plaintiff's evidence to make a case, the proper remedy is to grant a new trial.
3. **Landlord and Tenant.** Ordinances requiring protective measures to be taken in constructing apartment houses, and other like ordinances, impose a mandatory and affirmative duty upon the owners of such property, and a failure to perform such a duty so enjoined is negligence *per se*, and if any person to whom the duty is owed, or for whose protection the ordinance is enacted, is injured in consequence of such violation, a case is made.
4. **Negligence.** The burden of proof is upon the plaintiff in a personal injury action to establish that some one of the acts of negligence charged in the petition was the proximate cause of the injury of which complaint is made.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Brome & Thomas and *Robert Smith*, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action for damages for personal injuries against the owner of an apartment house. Plaintiff alleged that she suffered injuries by falling on a stairway that was negligently constructed and maintained by the owner of the building. At the close of plaintiff's case, the defendant moved for a dismissal on the ground that the evidence was insufficient to constitute a cause of action, which motion was overruled by the trial court. The motion to dis-

miss was renewed at the close of all the evidence and it also was overruled. The case was submitted to the jury and a verdict of $2,000 was returned for the plaintiff. Defendant then moved for a judgment notwithstanding the verdict and for an order sustaining defendant's motion for a dismissal. Defendant also filed a motion for a new trial. The trial court sustained defendant's motion for judgment notwithstanding the verdict, entered an order sustaining the motion to dismiss, and overruled defendant's motion for a new trial.

We are of the opinion that the trial court erred in sustaining the motion for a judgment notwithstanding the verdict. Under our practice a judgment notwithstanding the verdict may be had only when the pleadings confess facts entitling the moving party to a judgment. Our statute on the subject provides: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Comp. St. 1929, sec. 20-1315.

In *Manning v. City of Orleans,* 42 Neb. 712, 60 N. W. 953, we said: "Section 440 of the Code of Civil Procedure (Comp. St. 1929, sec. 20-1315) provides a remedy substantially like the motion for judgment *non obstante veredicto* of the common law. Such a judgment can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment." See, also, *Kenesaw Mill & Elevator Co. v. Aufdenkamp,* 106 Neb. 246, 183 N. W. 294; *Hamaker v. Patrick,* 123 Neb. 809, 244 N. W. 420. The pleadings do not entitle the defendant to a judgment and it is not so contended. It is clear, therefore, that a judgment notwithstanding the verdict cannot be granted because the evidence is deemed insufficient to sustain the verdict. The remedy in such case is governed by the following authorities:

"In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judg-

ment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans*, 42 Neb. 712, 60 N. W. 953.

"If the trial court is of opinion that, in view of plaintiff's evidence, it erred in submitting the case to the jury and should have directed a verdict for the defendant, the proper course is to grant a new trial." *Barge v. Haslam*, 65 Neb. 656, 91 N. W. 528.

"As applicable and mandatory at the stage of the proceedings set forth in the instant record, without reference to the bill of exceptions, this court has long announced, as the doctrine controlling, that, 'If the trial court is of the opinion that, in view of plaintiff's evidence, it erred in submitting the case to the jury and should have directed a verdict for the defendant, the proper course is to grant a new trial.' *Barge v. Haslam*, 65 Neb. 656.

"So, too, in reviewing a record involving the limitation under consideration, we have said: 'In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground.' *Manning v. City of Orleans*, 42 Neb. 712." *Hamaker v. Patrick*, 123 Neb. 809, 244 N. W. 420.

We necessarily come to the conclusion that there is nothing in the pleadings that warrants the granting of a judgment notwithstanding the verdict. Likewise, the authorities hold that, if it appears to the trial court that plaintiff's evidence was insufficient to warrant the submission of the case to the jury and that a verdict should have been directed for the defendant, the proper course is to grant a new trial. The trial court was therefore in error in dismissing plaintiff's case.

Defendant cites the following cases in support of a contrary view: *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335;

Bielfeldt v. Grand Island Transit Co., 123 Neb. 368, 243 N. W. 76; *LeBarron v. City of Harvard*, 129 Neb. 460, 262 N. W. 26; *First Nat. Bank v. Broyles*, 122 Neb. 414, 240 N. W. 546; *Pinches v. Village of Dickens*, 127 Neb. 239, 254 N. W. 877. The first three cases are clearly distinguishable. The rule announced by them in effect is: When a verdict has been returned by a jury that is in all respects free from prejudicial error, and the court thereafter wrongfully sets it aside, this court may correct the error by reversing the trial court's wrongful order and reinstating the original verdict and judgment based thereon. This procedure presupposes a valid verdict and judgment, free from prejudicial error. Such was not the situation in the case at bar. In *Pinches v. Village of Dickens, supra,* the disposition in this court was in accordance with the foregoing rule. The statement in the opinion, however, that the procedure followed in the district court in that case was in accordance with that suggested in *Netusil v. Novak, supra,* is not correct under the facts recited in that opinion. Clearly under the authorities herein cited, the trial court in that case was without authority to set aside a verdict and judgment and sustain defendant's motion for a directed verdict. The proper remedy, if the court felt the evidence was insufficient, was to grant a new trial. In *First Nat. Bank v. Broyles, supra,* the opinion shows that the pleadings sustained the entry of a judgment notwithstanding the verdict in accordance with the statute and cases cited in the forepart of this opinion.

The only question remaining is whether the trial court erred in vacating the verdict and judgment. Defendant contends that the evidence is insufficient to sustain the verdict. If defendant's contention is correct, the trial court rightfully set aside the verdict and judgment, which would require a new trial of the case.

Plaintiff's evidence may be summarized as follows: The plaintiff had resided in the Morris Apartments for eleven years prior to September 22, 1934, the date of the accident. On that day she was taking some flowers to the receiving

room for the housekeeper to deliver for her. To go to the receiving room she descended by a small stairway which led out of a small hall adjacent to the freight elevator. The only evidence as to how the accident happened was that of the plaintiff, who testified as follows: "Well, I walked out to the door and around that little corridor, and opened the door and stepped down and fell." The evidence discloses that the stairs were not constructed in accordance with the ordinances of the city of Omaha in force at the time in that the risers were ¼ to ½ inch higher than the prescribed height and the treads were 1¼ to 1⅜ inches narrower than the prescribed minimum width. It is also contended that the defendant was negligent in not maintaining proper light on the stairway.

The rule respecting the violation of ordinances such as we have in this case was stated by Letton, J., in *Stevens v. Luther,* 105 Neb. 184, 180 N. W. 87, in the following language: "Statutes requiring protective devices to be placed upon machinery, upon barbed-wire fences, scaffolding statutes, railroad fencing statutes, fire escape statutes, and other statutes of like nature, impose a mandatory and affirmative duty upon the owners of such property, and even in states where the violation of speed statutes is held to be only evidence from which negligence may be inferred, the courts generally hold that a failure to perform a mandatory duty so enjoined is negligence *per se,* and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made."

In *Hoopes v. Creighton,* 100 Neb. 510, 160 N. W. 742, we said: "The building was not equipped with fire-escapes as required by the statute. The evidence clearly shows that this neglect was the proximate cause of Rickard's death, and the defendant is liable in damages."

Also, in *Vanderveer v. Moran,* 79 Neb. 431, 112 N. W. 581, we said: "The failure to perform a statutory duty specifically imposed for the protection of the public is negligence, and, in the absence of contributory negligence, a

recovery may be had for the injury thereby occasioned."

In *Strahl v. Miller,* 97 Neb. 820, 151 N. W. 952, this court said: "The law seems to be well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure."

See, also, *Thompson v. Young Men's Christian Ass'n,* 122 Neb. 843, 241 N. W. 565; *Wendell v. Roberts,* 125 Neb. 619, 251 N. W. 264.

There is no evidence in the record that defendant's failure to comply with the building ordinances of the city of Omaha was the proximate cause of the injury. The only evidence on the subject is that plaintiff "opened the door and stepped down and fell." For aught we know she may have done any number of things that would have caused the accident and for which the defendant would not have been liable. The burden is upon the plaintiff and she has failed to produce any evidence to show that the act of defendant in violating the ordinance in any way contributed to this accident.

Plaintiff also claims that there was not sufficient light on the stairway. The evidence is that plaintiff had used this stairway from time to time for eleven years. The lights provided were burning and produced a light of no less intensity than on former occasions when plaintiff had used the stairs. Plaintiff testified that she was familiar with the stairs and all the circumstances surrounding their use. There is no evidence in the record that the lights, or a lack thereof, were the proximate cause of the injury. A verdict cannot rest on speculation and conjecture. The burden is upon the plaintiff to establish that the negligence of the defendant was the proximate cause of the injury. This the plaintiff has failed to do.

After giving plaintiff's evidence the benefit to which it is entitled, we necessarily conclude that the trial court was right in setting aside the verdict and judgment because of an insufficiency of the evidence to support them. The trial court should have granted a new trial. The order of the court in sustaining the motion for judgment notwithstanding the verdict and the judgment of dismissal thereafter entered are reversed, with instructions to grant a new trial in accordance with the holdings of this opinion.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: GLENS FALLS INDEMNITY COMPANY, INTERVENER, APPELLANT.

282 N. W. 382

FILED NOVEMBER 18, 1938. No. 30385.

1. **Banks and Banking.** An order fixing a time for the filing of petitions in intervention by a claimant whose claim has been classified as invalid by the receiver of an insolvent bank, as provided by section 8-1,100, Comp. St. 1929, is not a judgment within the meaning of chapter 20, art. 20, Comp. St. 1929.
2. **Assignments.** Ordinarily, a check is not an assignment *pro tanto* of the fund in the drawee bank.
3. ———. In order for a check which has not been presented and accepted to operate as an equitable assignment of a deposit in the bank upon which it is drawn, it must be accompanied by special facts and circumstances establishing it as such.
4. **Banks and Banking.** Where an agent of an insurance company, who has contracted to hold premiums collected by him in trust until delivered to the company, deposits them in a bank in a private account and comingles them with other funds, thereby causing their identity to become lost, all of which were subject to check, without an express trust agreement or facts from which such a relation could be inferred, the bank is not a trustee of the fund even though the agent was also the president of the bank.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem*, for appellant.

F. C. Radke and *O'Sullivan & Southard, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an appeal from an order of the district court for Douglas county denying the claim of the Glens Falls Indemnity Company that it was the owner of a certain deposit in the South Omaha State Bank of Omaha, Nebraska, at the time it became insolvent.

It appears from the record that John McGurk, the president of the bank, entered into an agency contract with the Glens Falls Indemnity Company in which he agreed to write various kinds of insurance for the company. It was further agreed that all premiums paid to the agent should be held at a fiduciary trust until delivered to the company. It further appears that C. W. Hepler was associated with McGurk in the Glens Falls Indemnity Company contract. Premiums received were deposited in an account entitled "Insurance Department, South Omaha State Bank, Omaha, Nebraska." At the time the bank was closed, the bank's records showed a balance of $1,472.58 in this fund. On the day the bank closed, McGurk delivered a check for $1,402.21 on the fund to the Glens Falls Indemnity Company, which was never paid. This check was given in settlement of the amount due the company for the month of June, 1931. The bank closed its doors on August 14, 1931, and at that time the amount owing by the agency to the company was $1,846. The company filed a claim with the receiver of the bank for $1,846, and C. W. Hepler also filed a claim for $1,472.58, the amount shown in the account on the records of the bank. On December 18, 1931, the receiver classified both claims as invalid, and the district court thereupon allowed 45 days for each of said claimants to file petitions in intervention to establish their claims.

On February 1, 1932, C. W. Hepler filed a petition in intervention under the name of "Insurance Department of the South Omaha State Bank, by C. W. Hepler, its agent." On March 30, 1932, the court sustained a demurrer to the petition and on the same day granted the Glens Falls Indemnity Company leave to intervene. On March 31, 1932, the petition in intervention of the company was filed. After a trial of the case, the court by a decree entered on April 28, 1937, disallowed the claim and the Glens Falls Indemnity Company now brings the case to this court for review.

The contention is made that the district court was without jurisdiction to authorize the filing of a petition in intervention in behalf of the Glens Falls Indemnity Company. It appears that on December 18, 1931, an order was entered ordering all persons with claims that were classified as invalid by the receiver, and who were dissatisfied with such classification, to file petitions in intervention within 45 days. The Glens Falls Indemnity Company obtained leave to and did file its petition in intervention more than 45 days after the order was made and at a subsequent term of court. The attorneys for the receiver contend that under the holdings in *State v. Security State Bank,* 125 Neb. 516, 251 N. W. 97, and *Bliss v. Bryan,* 123 Neb. 461, 243 N. W. 625, the order approving the classification of claims is a final judgment which cannot be modified at a subsequent term unless it comes within the provisions of chapter 20, art. 20, Comp. St. 1929. We quite agree that the allowance of a claim by the court is a judgment and the cases above cited are authority for this statement. But an order requiring the formation of issues and pleadings within a time to be fixed by the court on a claim that has been classified as invalid by the receiver presents an entirely different question. The applicable part of the statute in force at the time was as follows: "At the time of said hearing, the court shall fix a time for hearing on the claims filed by the receiver as invalid, and recommended by him for disallowance, * * * and the court shall direct the manner of making

up the pleadings on said claims and the notice which shall be given thereof to claimants." Comp. St. 1929, sec. 8-1,100. It will be noted that this statute does not provide for the entry of a judgment disallowing the claims classified by the receiver as invalid. As a matter of fact it provides for a further hearing on claims classified as invalid before a judgment is entered. It will also be observed that the manner of making up the pleadings and the notice to be given rests in the discretion of the trial court. Under such circumstances, the court had the right to authorize the Glens Falls Indemnity Company to file a petition in intervention after the 45 days provided therefor by the court's previous order had elapsed. No definite limitation for the filing of petitions in intervention having been fixed by the statute and the manner and time of their filing having been placed expressly within the discretion of the district court, no error in permitting the filing of the petition in intervention has been shown.

It is not disputed that John McGurk had the sum of $1,472.58 on deposit in the South Omaha State Bank under the name of "Insurance Department, South Omaha State Bank, Omaha, Nebraska." On the day the bank closed McGurk delivered a check to the Glens Falls Indemnity Company in the amount of $1,402.21. The company insists that this constitutes an assignment *pro tanto* of $1,402.21 of the amount on deposit.

A check is not ordinarily an assignment *pro tanto* of the fund in the drawee bank. Comp. St. 1929, sec. 62-1606; *State v. State Bank of Belvidere,* 122 Neb. 797, 241 N. W. 755.

The contention is advanced that the Glens Falls Indemnity Company comes within the exception that a check may operate as an equitable assignment of moneys belonging to the drawer in the hands of the drawee when it is drawn against a specific fund with such particularity as will clearly show the intent of the parties to charge the special fund. In support of this contention, appellant cites the following quotations from American Jurisprudence:

"It is clear, from the provision of the Uniform Negotiable Instruments Act that a check 'of itself' does not operate as an assignment, that special facts and circumstances attending the drawing and delivery of a check may give to its issuance the character of a *pro tanto* assignment of the funds in the hands of the drawee. Thus, it appears that an express agreement between the drawer and drawee that the check will be paid by the drawee from the funds of the drawer on deposit will have this effect, even though such agreement may be unknown to the payee. Upon like principle, if the check is drawn upon a particular, specific, and designated fund, it will be treated as an equitable assignment *pro tanto* of that fund." 7 Am. Jur. 387, sec. 535.

"Although a check may not of itself operate as an assignment of the drawer's funds on deposit with the drawee bank, yet it has been the well-settled rule, both before and after the adoption of the Uniform Negotiable Instruments Act, that a check drawn upon the whole or a part of a particular or specific fund, though the check is unaccepted or is not certified, operates as an equitable assignment *pro tanto* of such fund as between the drawer and the payee and as against mere volunteers and parties charged with notice, and gives the holder a right in equity to recover the amount from the drawee bank." 7 Am. Jur. 388, sec. 536.

It cannot be disputed that premiums collected by McGurk for the Glens Falls Indemnity Company were deposited in this fund. The record also shows that other funds, the origin of which is not shown by the record, were also deposited in the same account. None of them was deposited for any specific purpose. It is apparent that these funds were deposited in the name of "Insurance Department" for the convenience of McGurk and for no other purpose. They were subject to check by McGurk and for all purposes appear to have been treated as an ordinary checking account by him. Under these circumstances, a debtor and creditor relationship was established between McGurk and the South Omaha State Bank. The check given by McGurk to the Glens Falls Indemnity Company for $1,402.21 is in

no different status than a personal check drawn by him on the bank. There are no special facts or circumstances shown in the record that take it out of the general rule that a check does not of itself constitute a *pro tanto* assignment of the fund against which it is drawn. The assets of the bank were in no way augmented by the transaction. The transaction includes no circumstances from which it could be inferred that there was any intention on the part of McGurk to assign an interest in this deposit. There having been no presentment and acceptance of the check by the South Omaha State Bank, the Glens Falls Indemnity Company has obtained no rights against the bank or its receiver.

Appellant contends that the fund designated as "Insurance Department" in the bank was a trust fund created for the benefit of the Glens Falls Indemnity Company. There is no direct evidence of any such an arrangement. The record shows that moneys obtained from premiums on insurance written for the Glens Falls Indemnity Company were placed in this fund. But other funds were also kept in this same account, the source of which the record does not disclose. The amount of the fund that was derived from premiums on insurance sold for the Glens Falls Indemnity Company is not satisfactorily established by the record. There is no evidence of any intent to segregate the fund from the funds of the bank. It was clearly intended by McGurk as a general deposit for his own convenience. The knowledge of the bank was no greater than that of McGurk himself, he being its president. Essential elements are lacking to make the Glens Falls Indemnity Company the beneficiary of a trust.

The trial court was therefore right in denying the claim of the Glens Falls Indemnity Company. The judgment is

AFFIRMED.

GLOBE INDEMNITY COMPANY, APPELLEE, V. THAYER COUNTY BANK, APPELLANT.
282 N. W. 400

FILED NOVEMBER 18, 1938. No. 30374.

Banks and Banking. Where a draft is deposited with a bank and credited by it to the depositor, forwarded to a corresponding bank for collection and there paid by the drawee, the corresponding bank crediting the account of the forwarding bank with it in the amount of the draft; subsequently the drawee notifies both banks by telegram that the bill of lading attached to the draft is a forgery and warns the forwarding bank not to divert the funds to the drawer of the draft; and where the forwarding bank has had notice and has not disbursed the funds evidencing the draft; *held*, the forwarding bank received the funds as agent, and the funds so paid by the drawee were paid under circumstances existing at the time of payment that would entitle the payer to recover the funds back from the principal, and the forwarding bank, as agent, is liable to the payer for the funds so received so long as such funds remain in the forwarding bank, and where the evidence discloses that there has been no alteration in the situation of the forwarding bank towards its principal in relation to such payment.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

John L. Richards, Stewart, Stewart & Whitworth and *Charles B. Paine,* for appellant.

Hall, Cline & Williams, contra.

Heard before ROSE, C. J., EBERLY, DAY, CARTER and MESSMORE, JJ.

MESSMORE, J.

The plaintiff, as assignee of Goffe & Carkener, Inc., brought this action to recover from the Thayer County Bank the proceeds of a draft, dated February 1, 1930, with an attached, forged bill of lading. The draft was paid by Goffe & Carkener without knowing that the bill of lading was a forgery. The second amended petition details at considerable length evidentiary facts relating to the transaction.

The second amended answer admits the execution and payment by the plaintiff of the draft, with the forged bill of lading attached, and notice of such forgery; alleges evidentiary facts which defendant contends constitute the defense of payment, and alleges and sets forth facts which defendant contends constitute estoppel. The reply is a general denial, with the admission of certain evidentiary facts.

At the conclusion of all the evidence, the district court for Thayer county directed a verdict in favor of the plaintiff in the sum of $1,909.70, and from this verdict of the jury and the judgment of the court thereon, the defendant appeals.

The evidence is mostly by stipulation and discloses the following: George Hayes was doing business in the name of the Hebron Grain Company, at Hebron, Nebraska, and on January 29, 1930, deposited with the defendant bank a draft for $1,300, dated January 29, 1930, drawn upon Goffe & Carkener, which draft was accepted and paid on January 31, 1930, by Goffe & Carkener to the Stock Yards National Bank of Kansas City. On January 31, 1930, George Hayes, representing the Hebron Grain Company, deposited with the defendant bank a draft for $1,400, dated January 31, 1930, on the Updike Grain Company, which draft was accepted and on February 1 was paid by the grain company to the Stock Yards National Bank. Attached to both drafts were forged bills of lading. The draft sued on in this action was for $1,300, dated February 1, 1930, deposited with the defendant on the same day, drawn on Goffe & Carkener, and accepted and paid by it on February 3, 1930, to the Tootle-Lacy National Bank, of St. Joseph, Missouri. George Hayes took his own life on February 3, 1930. When the three drafts, as above set out, were deposited with defendant, they were credited to the account of the Hebron Grain Company and forwarded by defendant to its respective corresponding banks for collection. On January 29, 1930, at the time of the deposit of the draft of that date, there was a balance of $2,687.03, including the 1,300-dollar draft, in the defendant bank, in favor of the Hebron Grain Com-

pany. Subsequent to such date, and prior to the death of George Hayes, the Hebron Grain Company had withdrawn a total amount of $3,742.64. On January 31, 1930, a deposit of $2,520.31 was made in the account, and on February 1 a deposit of $1,300, being the last deposit made therein. These two deposits, added to the balance of $2,687.03, and totaling $6,507.34, constituted the account of the Hebron Grain Company with the defendant from January 29 up to the date of the death of George Hayes. Deducting the withdrawals, taken from the balance, left a credit to the Hebron Grain Company of $2,764.70, at the time of George Hayes' death.

On February 5, 1930, Goffe & Carkener, by telegram, notified defendant that the bill of lading attached to the 1,300-dollar draft, paid by it on February 3, was probably a forgery, advised defendant that it would be held responsible if the proceeds were diverted to the estate of George Hayes, and suggested that defendant take steps to recover for its credit. On February 19, 1930, Goffe & Carkener sent a telegram to defendant, referring to its telegram of February 5, making demand on defendant for refund of the payment on the forged bill of lading attached to the draft sued on. The defendant replied that the Hebron Grain Company account contained a balance of $50; that the Stock Yards National Bank and the Fidelity Trust Company of Kansas City paid $2,700 on drafts which they held because of the instructions of Goffe & Carkener. The two drafts, one for $1,300, dated January 29, 1930, against Goffe & Carkener, and one for $1,400, dated January 31, against Updike Grain Company, which had been forwarded to the Stock Yards National Bank were collected by said bank, and later said amounts were impounded by the courts and not remitted by the Stock Yards National Bank to the defendant. The action to impound these amounts was filed by Goffe & Carkener some time after February 12, 1930, and by the Updike Grain Company February 21, 1930. The Stock Yards National Bank paid Goffe & Carkener $1,300, which evidently was in payment of the January 29 draft,

and paid the Updike Grain Company $1,400 in payment of the draft of January 31. Obviously, the draft for $1,300, sued on in this action, dated February 1, for which the Tootle-Lacy National Bank was the collecting agent, had nothing to do with the payment of the two other drafts. The $2,700 was charged to the defendant's account by the Stock Yards National Bank. The record does not disclose that the defendant was served with process in the action brought by Goffe & Carkener and Updike Grain Company against the Stock Yards National Bank and the defendant.

After the Stock Yards National Bank had charged the defendant's account with $2,700, the defendant reduced the deposit of the Hebron Grain Company with it in the sum of $2,700, which left in the defendant bank to the credit of the grain company the amount of $54.40, $9.30 having been paid out for a telephone account and $1 for elevator rent under date of February 4, 1930. The evidence further discloses that on February 15, 1930, the defendant bank closed its account with Tootle-Lacy National Bank by withdrawing the funds then on hand. The evidence shows that defendant held a chattel mortgage against the Hebron Grain Company for indebtedness of the company to the bank. This mortgage was dated October 2, 1925, and the chattels under it were sold by the administrator of the Hayes estate in March or April, 1931, for $11,525, out of which defendant bank received $9,300 and remitted to the estate $2,225. The defendant claims that it had no notice of any other claim of Goffe & Carkener, or of any other person, based on any other draft than that of February 1, 1930, the draft here in suit, and produced two witnesses who testified that the first notice they had of the plaintiff's claim was in 1932, one witness testifying that it was on July 21 of that year.

The defendant contends that the verdict and judgment are contrary to the evidence and the law.

Defendant contends that it actually paid the proceeds of the draft of February 1 to the plaintiff; that the Stock Yards National Bank gave credit for the proceeds of the

January 29, 1930, draft to the defendant, and that it actually disbursed the proceeds to Hayes prior to his death, which disbursement was two days before defendant had notice even of the February 1 forgery. Defendant also claims that the evidence shows that the Stock Yards National Bank, without authorization from defendant, paid plaintiff $1,300 because of some action taken by or at the instance of plaintiff, and that the Stock Yards National Bank charged the $1,300 against the defendant's account with it; that is, defendant involuntarily paid the $1,300. "Involuntary" is defined as "Not proceeding from choice." Webster's New International Dictionary.

Defendant contends that the burden is on the defendant to establish payment and on plaintiff to show that an admitted payment was properly applied on another debt, citing in support thereof *Davis v. Hall*, 70 Neb. 678, 97 N. W. 1023; *Krause v. Cox*, 105 Neb. 728, 181 N. W. 611; and *Hill v. Pettit*, 23 Ky. Law Rep. 2001, 66 S. W. 188. Under the facts of each case cited, we can readily admit that the principle of law therein announced is thoroughly applicable. In furtherance of its contention, defendant urges that the payment being an involuntary payment the burden of proof is on the plaintiff to prove that the involuntary payment was properly applied upon an enforceable claim, citing in support thereof *Breslin v. Boyle*, 4 Walker (Pa.) 428; *Scheffer v. Tozier*, 25 Minn. 478; and 3 Williston, Contracts, 3110, sec. 1797.

In *Breslin v. Boyle, supra*, an action was brought by a creditor against the widow of a deceased debtor, to recover for the total amount of merchandise furnished both the husband and the wife during the lifetime of the husband, and, after his death, for the account against the wife. The wife admitted that the plaintiff could recover for the amount of goods furnished her, but that she was under no legal obligation to pay the indebtedness of her husband during his lifetime. The court held that the widow was under no legal or moral obligation to pay for the merchandise ordered during her coverture, as a claim therefor could not be enforced

against her either in law or in equity; that plaintiff could not appropriate therefor, without her consent, payments made after coverture was removed at a time when he had neither a legal nor a valid claim against her.

The case of *Scheffer v. Tozier, supra,* had to do with a contract for the sale of timber, to be cut on a specified piece of ground. A certain amount of timber was cut, some of which was not on the land to which one of the contracting parties held title. The court merely held that payment was not due to the contracting party on timber not owned by him and that he could only recover payment on the timber cut on the land where he could give title thereto.

In 3 Williston, Contracts, 3110, sec. 1797, it is said: "Of course, application cannot be made by the creditor to a claim which has no validity, * * * it seems clear that since the debtor, though not directing the exact application of a payment, may exclude a particular application; and since it should be the primary principle that no violence is done to the intention of the debtor as expressed to the creditor by words or acts or circumstances, the creditor cannot appropriate the payment to a claim which he knows is disputed however little ground there may be for the dispute."

Analyzing the evidence in the instant case, we find the facts very different from those in the cases cited by defendant on its propositions of law hereinbefore set out. In the case at bar, the suit was brought on the draft dated February 1, with a bill of lading, admittedly forged, attached. The defendant was in a position to know, and obviously did know, that three drafts had been deposited with it, which it credited to the account of the depositing party, forwarding the drafts to defendant's respective corresponding banks for collection. The Stock Yards National Bank did collect the draft of January 29 for $1,300, which Goffe & Carkener paid, and the draft of January 31 for $1,400, which the Updike Grain Company paid. The defendant had knowledge of the amount of each draft and received notice from the Stock Yards National Bank that the money had been impounded by Goffe & Carkener and by the Updike Grain

Company. And, after the Stock Yards National Bank had charged defendant's account with the $2,700, defendant reduced the deposit of the Hebron Grain Company by $2,700, as testified to by Martin J. Dagefoerde, a witness for the defendant: "Q. What became of that money, can you tell? A. The $2,700? After the bank at Kansas City charged our account with $2,700 we had to reduce our balance there by that amount, see, and in doing that we had to put the currency out of the safe back into the bank in order to offset that $2,700 charge which was paid by the Kansas City bank." J. R. Kenner, on direct examination, testified: "Q. What charges did you make against that account after the death of George Hayes? A. There was $2,700 deducted from the funds appropriated by the Stock Yards National Bank." There is evidence also that officers or employees of the Stock Yards National Bank called the defendant and related the circumstances of the impounding of the money in the Stock Yards National Bank. The Stock Yards National Bank paid to Goffe & Carkener and to the Updike Grain Company the amount of money that had been advanced by them in payment of the drafts. The action of the defendant in this behalf speaks for itself, as a recognition of the validity of the two claims and that the two drafts were an enforceable obligation by Goffe & Carkener and Updike Grain Company, and, in fact, the circumstances and evidence constitute an acquiescence in and ratification of the action of the Stock Yards National Bank in paying the claims of Goffe & Carkener and of Updike Grain Company. No case cited by defendant to support its contention meets such a state of facts as existed in the instant case, and, without denying the principles of law stated in the cited cases, the circumstances and facts in the instant case are not such that the principles of law as announced in the cases cited by defendant are applicable.

On the proposition of estoppel, urged by defendant, in that it claims to have parted with valuable security and turned over a sufficient amount of funds to the administrator of the Hayes estate to have protected itself against

loss, had the defendant had knowledge of any claim other than the draft of February 1 of Goffe & Carkener against the defendant until after the security had been sold, we believe the facts, as hereinbefore set out, clearly establish that estoppel is not a defense.

The defendant received the draft of February 1, 1930, deposited it to the credit of the Hebron Grain Company, and forwarded the draft to its corresponding banks for collection. The defendant was serving in the capacity of an agent of the Hebron Grain Company. The Tootle-Lacy National Bank received the draft for collection and was acting for and on behalf of the defendant as a subagent. Goffe & Carkener, by telegram, both to the Tootle-Lacy National Bank and defendant, notified them that the bill of lading attached to the draft was probably a forgery. The defendant at the time the last telegram was received, on February 19, had the funds in its possession and had not diverted them to the estate of George Hayes; in other words, had not paid out any of such funds to its principal, the Hebron Grain Company.

Plaintiff cites 2 Am. Jur. 264, secs. 335 and 336. Section 335 reads in part as follows: "An agent to whom money has been paid for his principal through error, or under other circumstances existing at the time of payment that would entitle the payer to recover it back from the principal, is individually liable to the payer for the money so received so long as it remains in his hands and there has been no alteration in the situation of the agent towards his principal in relation to such payment."

Section 336 reads: "The effect of the agent's payment over to the principal of money which has been paid to him by a third person under mistake of fact to relieve the agent of personal liability depends upon whether the agent at the time of making payment to the principal had notice of the facts. If the agent turns the money over to the principal before he has notice that the principal is not entitled to it he is not liable therefor to the payer. If, however, the agent knows that his principal is not entitled to the funds received

for the principal from a third person, he is under a duty to return them to the one rightfully entitled thereto; if he turns over such funds to the principal with knowledge that the latter is not entitled thereto, he becomes personally liable therefor.

"For settlement with or payment to the principal to relieve the agent from liability, the settlement must be an actual one and not the constructive one arising from a change in their relations from agent and principal to debtor and creditor. Merely placing the payment to the credit of the principal will not exonerate the agent from liability to the payer in event of his recalling the payment."

Plaintiff contends that the above propositions of law apply to the facts in the instant case, and in further support thereof cites the early Massachusetts case of *Garland v. Salem Bank,* 9 Mass. 407, and *Metropolitan Nat. Bank v. Merchants Nat. Bank,* 182 Ill. 367, 55 N. E. 360, as meeting the principles of law announced in said sections 336 and 335, respectively. See, also, *Hirning v. Federal Reserve Bank,* 52 Fed. (2d) 382; *National Park Bank v. Seaboard Bank,* 114 N. Y. 28, 20 N. E. 632; *Bromfield v. Gould,* 289 Mass. 80, 193 N. E. 796; *Elliott v. Swartwout,* 10 Peters (U. S.) 137; Restatement, Agency, sec. 339.

We believe that the evidence discloses that plaintiff has proved the agency theory, pleaded in its second amended petition. In view of our holding, it is not necessary to discuss the warranty theory; nor the applicability of the federal bill of lading act and certain of its provisions to this case.

The district court did not err in directing a verdict for the plaintiff.

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. RALPH M. WORLEY ET AL., APPELLEES: OMAHA NATIONAL BANK, TRUSTEE, ET AL., APPELLANTS.
282 N. W. 476

FILED NOVEMBER 26, 1938. No. 30402.

1. **Mortgages: EVIDENCE.** Fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith, and good faith of a subsequent encumbrancer in reliance upon the fraudulent release of the mortgage of record may be shown in the same manner.
2. **Executors and Administrators.** One dealing in good faith with an administrator of an estate or trustee appointed by a court or attorney at law in good standing may reasonably infer the fiduciary is acting in a representative capacity in the performance of duty, in absence of knowledge to the contrary or of circumstances indicating fraud.
3. **Estoppel.** "Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May*, 117 Neb. 262, 220 N. W. 276; *First Trust Co. v. Danielson*, 132 Neb. 141, 270 N. W. 680.
4. **Subrogation.** A surety on a fidelity bond who partially restores a loss created by the fraud of the principal obligor cannot thus acquire by subrogation a greater right than that formerly possessed by the party for whose benefit the bond was given.
5. ———. "The right of subrogation must in every case rest upon some recognized subject of equitable cognizance." *Chicago Lumber Co. v. Anderson*, 51 Neb. 159, 70 N. W. 919.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

Kennedy, Holland, De Lacy & Svoboda, Edwin C. Cassem and *Anson H. Bigelow*, for appellants.

William H. Hein, Philip M. Wellman, Franklin L. Pierce, Philip N. Johnston, Mitchell & Gantz and *Donald E. Williams, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

This is a suit in equity commenced by the Federal Land Bank of Omaha, plaintiff, to foreclose a 6,000-dollar mortgage as a first lien on 1,092.57 acres of land in Box Butte county. Plaintiff is mortgagee and Ralph M. Worley and Edith Worley, husband and wife, are mortgagors and defendants. Others claiming an interest in, or lien on, the mortgaged land are also defendants.

When Thomas Dean owned this land, he sold it to Guy L. Worley and took from the purchaser and the latter's wife, Nell Worley, April 7, 1917, a 12,000-dollar mortgage thereon, payable April 7, 1927, for part of the purchase price. In 1917 or 1918, Ralph M. Worley, defendant, purchased from his brother, Guy L. Worley, the title to the land and assumed the purchase-money mortgage of $12,000 thereon.

With this mortgage in favor of Thomas Dean unpaid, Dean willed his property to the United States Trust Company of Omaha in trust for testator's three sisters and one brother. The trustee was directed to pay the income from the estate of testator to a sister, Maria Lund, during her life, and at her death to divide the residue, when reduced to cash, among two other sisters and testator's brother. The will was duly probated in the county court of Douglas county May 10, 1923. The nominees named in the will for executors and the trustee selected by testator declined to serve, and George H. Merten, attorney, under court order, became administrator with the will annexed. He was also appointed trustee for the beneficiaries under the trust created by the will. He made his final report as administrator and procured the discharge of himself and his surety in the county court of Douglas county without accounting for the 12,000-dollar mortgage then unpaid. Maria Lund died in 1931.

For a recited consideration of $3,500 Thomas Dean by formal written instrument without limitation, filed of record, had assigned the $12,000 mortgage to the Alliance National Bank August 3, 1922, and the latter, "for value received," transferred "all its rights, title and interests"

therein to Sam Riseman by formal writing, also recorded.

In lieu of the unpaid Dean-Worley purchase-money mortgage for $12,000, which Ralph M. Worley assumed, the latter and his wife executed and delivered two mortgages on the same land, one for $6,000 and the other for $5,000. The first of the two was payable to the Federal Land Bank of Omaha, mortgagee, plaintiff. It paid the borrowed money or the net proceeds of this loan, $5,650, September 21, 1925, to George H. Merten for Sam Riseman by direction of mortgagors. This is the mortgage which plaintiff seeks to foreclose herein. The mortgage for $5,000 was dated August 1, 1925, and was payable in 10 annual instalments of $500 each with interest to Sam Riseman, who, "in consideration of the payment of the debt," released and satisfied of record, October 2, 1925, the 12,000-dollar mortgage.

In a former suit in equity, the Dean heirs and the beneficiaries under the trust created by the probated will of Thomas Dean, deceased, recovered in the district court for Douglas county a judgment setting aside the discharge of George H. Merten as administrator and his surety and requiring Merten to account for $8,315.15 lost to the Dean estate through his neglect and fraud. Judgment therefor was entered against him. *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114. As trustee, Merten was succeeded by the Omaha National Bank, defendant.

The Federal Land Bank, plaintiff, pleaded that the mortgage for $12,000 was paid and released of record and that its 6,000-dollar mortgage was the first lien on the land described therein. Defaults in payments were alleged in the petition of plaintiff and there was a prayer for foreclosure.

All necessary parties were brought into court. Defendants Worley filed a general denial.

The Omaha National Bank, defendant, trustee, and the beneficiaries of the Dean trust, by answer and cross-petition, alleged in effect that the 12,000-dollar mortgage was part of the trust estate; that it was assigned by Thomas Dean to the Alliance National Bank as collateral security for a note for approximately $3,000; that, subject to this

pledge, the mortgage belonged to the Dean estate or the beneficiaries of the trust; that the assignment to Riseman was procured by the fraud of Merten and Riseman; that the release of the mortgage belonging to the Dean estate and the subsequent mortgages to plaintiff and Riseman were procured by Merten and Riseman for the purpose of defrauding the Dean heirs for whom Merten had been trustee; that plaintiff and the defendants Worley were chargeable with knowledge of the fraud and with bad faith in their negotiations; that, in an accounting required by all the fraudulent transactions, the purchase-money mortgage be reinstated and foreclosed as a first lien for the amount due the beneficiaries of the Dean trust.

The principal issues in the controversy were the good faith of plaintiff in lending the Worleys $6,000 on their mortgage and the good faith of the Worleys as participants in the refinancing of the 12,000-dollar mortgage on their land by the execution and delivery of the two subsequent mortgages aggregating $11,000.

Upon a trial of the issues herein, the district court decreed foreclosure of plaintiff's 6,000-dollar mortgage as a first lien for unpaid principal and interest amounting to $8,433.83; decreed foreclosure of the 5,000-dollar mortgage as a second lien for unpaid principal and interest amounting to $3,489.08 owing to the Omaha National Bank, present trustee, and the beneficiaries of the trust created by testator in his will; decreed the dismissal of the cross-petition of the same trustee and beneficiaries for the foreclosure of the 12,000-dollar mortgage.

The Omaha National Bank, trustee, and the beneficiaries of the trust appealed to the supreme court, insisting that the purchase-money mortgage for $12,000, subject to the assignment by Dean to the Alliance National Bank as collateral security for his unpaid debt of $3,093, was the property of the Dean estate or of the Dean heirs; that the assignment to Riseman was fraudulent and did not transfer to him the interests of the Dean heirs; that Riseman's release of the mortgage was also fraudulent and did not dis-

place the prior lien; that the facts, transactions and circumstances in evidence were such as to charge plaintiff and the Worleys with knowledge of the fraud and to disprove their pleas of good faith in their transactions with Merten and Riseman in dealing with trust property.

On appeal the trustee and beneficiaries invoke the rule that fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith. Comp. St. 1929, secs. 62-402 to 62-406; *Western Union Life Ins. Co. v. Mayhew, ante,* p. 6, 280 N. W. 250. The following circumstances in evidence are cited to prove bad faith of plaintiff in lending the Worleys $6,000: Assignment of the note and first mortgage for $12,000 as collateral security for the 3,500-dollar note to the Alliance National Bank and assignment to Riseman of that bank's "rights, title and interests" only; offer of $8,500 to Merten for the note secured by the 12,000-dollar mortgage; Merten without county court's authority to sell the Dean-Worley note; check of plaintiff for the proceeds of the 6,000-dollar loan and mortgage payable to Merten personally, not as administrator.

Other evidence of circumstances indicates fraud perpetrated by Merten, neglect, betrayal of trust and conversion of trust funds.

The only benefit accruing to the Dean estate or to the Dean heirs from the Worley mortgages through the transactions in which Merten participated was the discharge of the debt of $3,093 owing by the Dean estate to the Alliance National Bank and this transaction was essential to the consummation of the fraud perpetrated. The neglect and fraud of Merten as administrator, trustee, or attorney at law resulted in two complicated suits in equity in the district court for Douglas county, in two appeals to the supreme court of Nebraska and in perplexing litigation in federal courts of Montana. The present record is burdened with evidence of former litigation in efforts to redress wrongs perpetrated by the trusted officer of the courts. No one would deliberately assume such hazards without some

plan to escape detection. Fraud may deceive the innocent and the vigilant and the resulting loss may fall upon others who are honest and without fault. Loss caused by fraud is not always fully restorable in equity. In the present case there are also circumstances indicating good faith of plaintiff and the Worleys.

The Federal Land Bank, plaintiff, was engaged in the business of lending money. The application for the loan and subsequent negotiations therefor were regular. Plaintiff exacted an abstract showing title in the Worleys. When Merten received for Riseman the check of plaintiff for the 6,000-dollar loan to the Worleys, the abstract and the public records showed that the title to the land was in the Worleys; that Riseman had become the holder of the 12,000-dollar mortgage and had satisfied it of record as paid; that counsel in good standing had examined the abstract and in effect advised plaintiff its loan of $6,000, if secured by mortgage, would be the first lien. Plaintiff and the Worleys relied on the public records. There is direct evidence that they were without knowledge of the fraud and that they acted in good faith. If so acting, they had a right to contract for the reduction of the purchase-money mortgage to liens aggregating $11,000. At that time no part of the principal of the 12,000-dollar mortgage had been paid by the Worleys to the Dean estate or to the beneficiaries of the trust. The purpose of Merten to appropriate to his own use the proceeds of plaintiff's loan, if a fact, was not then known. It was a natural inference that as administrator or trustee or attorney he would perform his duties in those capacities. Owners of notes and mortgages may lawfully sell them for less than their face value. The fact that the assignment from the bank to Riseman recited only "rights, title and interests" of assignor transferred was not necessarily a warning to look out for fraud, since the public record showed Dean's transfer of the entire mortgage to the Alliance National Bank was without reservation.

Dean himself made fraud and loss possible by failing to limit his assignment to its real purpose—collateral security for his note. The pertinent rule of equity is:

"Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May,* 117 Neb. 262, 220 N. W. 276; *First Trust Co. v. Danielson,* 132 Neb. 141, 270 N. W. 680.

The preponderance of the evidence is that Merten, in connection with the fraudulent transactions in which he participated, acted as administrator or trustee or attorney and that plaintiff and the Worleys understood he acted in a representative capacity.

Circumstantial evidence may be as effective to prove good faith as to prove bad faith in transfers involving unmatured negotiable notes and mortgages securing them. On the whole record, considered from every standpoint, the preponderance of the evidence proves that plaintiff and the Worleys acted in good faith in the transactions resulting in the execution and delivery of the 6,000-dollar mortgage and that it is the first lien on the Worley land.

The appeal presents another problem. The beneficiaries of the Dean trust pursued Merten's surety, the Southern Surety Company of New York, in federal courts of Montana, attached bonds of the surety there and received $7,500 in partial settlement of that litigation. Louis H. Pink, liquidator of Merten's surety, intervened in the suit at bar and, to the extent he had restored to the Dean heirs the amount of his payment to them, prayed for subrogation to their rights in the mortgage for $12,000 or, in the alternative, to the rights of the Dean heirs in the 5,000-dollar mortgage payable to Riseman.

The district court found there was no equity in the plea for subrogation and dismissed the petition of intervener. From that order he appealed.

The surety was not entitled to subrogation. "The right of subrogation must in every case rest upon some recognized subject of equitable cognizance." *Chicago Lumber Co. v. Anderson,* 51 Neb. 159, 70 N. W. 919. As already determined, the Dean heirs had no interest in the released

mortgage which they could enforce against the innocent Worleys. The surety, therefore, could not acquire by subrogation an interest or right not formerly possessed by the Dean heirs. *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583. No part of the debt owing to the Dean heirs under the Riseman mortgage was paid by the surety and the equity essential to subrogation had no existence.

Prejudicial error in the proceedings and judgment below has not been found.

AFFIRMED.

DALTON STATE BANK, APPELLEE, V. JACOB W. ECKERT ET AL., APPELLANTS.
282 N. W. 490

FILED NOVEMBER 26, 1938. No. 30406.

1. **Attorney and Client.** Where it appears that two judgments arising out of the same transaction have been obtained by each of two parties against the other, equity will subordinate an attorney's lien to the right of set-off.
2. **Judgment.** If the equities subordinate an attorney's lien to the right of set-off, where there are two judgments, it is immaterial that one may be founded upon contract and the other on tort.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

M. V. Beghtol, A. J. Kinnersley and *Golden P. Kratz,* for appellants.

Neighbors & Coulter and *Paul L. Martin, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

This case involves the right of priority between an attorney's lien and the right of offset of a judgment creditor. From an adverse ruling, the attorneys have appealed.

As the question at issue grew out of several lawsuits, it is necessary, for a proper understanding, to make a rather complete statement of the facts.

Defendant Jacob W. Eckert lived in Morrill county, and became indebted to the Dalton State Bank in the sum of $2,900. He gave a note secured by a second mortgage upon real estate and also by a mortgage upon certain chattels. In 1932, the said bank having temporarily suspended business, its cashier, for the purpose of taking additional security, divided this same loan and the interest due thereon into two notes, one of $900 and one of $2,137.75, and, in addition to the security already given, the cashier took a new chattel mortgage upon farm implements, machinery, live stock, and other chattels to secure the new $900 note, and agreed to return to him the old note of $2,900 if the bank reopened, but, in the event it failed to reopen, then the two new notes and mortgage would be returned, but no return was ever made of either.

On January 13, 1934, the First Trust Company of Lincoln, as trustee, started to foreclose its first mortgage upon Eckert's land, and on March 5, 1934, the Dalton State Bank filed a cross-petition on its second mortgage on this same land, and a decree was entered April 16, 1934, finding the amount due on the first mortgage to be $9,097.50, and on the second mortgage the sum of $3,618.71.

On April 9, 1934, which was shortly before the entry of the above decree of foreclosure, the Dalton State Bank brought an action in replevin in the district court for Morrill county, and replevied all the chattels covered by the chattel mortgage given to secure the $900 note. The chattels so replevied were sold, and this amount was credited on the $900 note given by Eckert.

In said action Eckert charged in his answer and cross-petition that the indebtedness involved in the replevin action was the same as the indebtedness represented by his original note of $2,900, and that no permission of court had been obtained to commence the action at law while the foreclosure action was still pending.

On June 29, 1934, an agreement for attorney's fees was entered into between Jacob W. Eckert and attorneys Golden P. Kratz, of Sidney, and A. J. Kinnersley, of Dalton, in which Eckert agreed to pay them $1,000 out of any money or property to be recovered in the replevin action brought by the bank under which his farm stock and equipment were sold, or out of any judgment secured against the Dalton State Bank, and if no judgment was secured the attorneys were to receive no fee. It was clearly stated in the contract that, if the judgment secured against the bank was $1,000 or less, the attorneys should receive it all. It was also provided in the contract that other suits were pending against Eckert and that they should continue to represent him in the other cases, and their fees in such other cases should be approximately double what ordinary attorney fees would be, because of the fact that they could only be paid in case they secured a judgment against the bank in the replevin case.

After trial therein, defendant Eckert secured a judgment for damages against plaintiff bank for the tort it had committed in the replevin case. Eckert's attorneys had filed notice of their lien in the replevin case on October 2, 1934, and shortly after the entry of the judgment in favor of Eckert he duly assigned the same to his attorneys. This judgment was assigned in Morrill county, and the Dalton State Bank was located in Cheyenne county; therefore, in June of 1935 a transcript was filed in Cheyenne county, where the bank is located, and the bank asked to have the execution of the judgment of Eckert enjoined until such time as it could go into the Morrill county district court and secure a deficiency judgment against Eckert there on the foreclosure, which it claimed would be paramount to the attorneys' lien which the attorneys held.

The foreclosure case was pending for a considerable time, due to stays of various kinds, but on February 17, 1937, it came on to be heard upon the application of the bank for a deficiency judgment upon its second mortgage. The court found that the original note was for $2,900, upon which

$228.92 had been paid; that on September 26, 1934, the bank had filed a remittitur, and a balance remained due and unpaid in the sum of $3,292.11, with interest at 10 per cent., which was duly entered as a deficiency judgment.

After the deficiency judgment was entered, the court held that the right of offset to the bank because of this deficiency judgment was superior to the attorneys' lien and the judgment which had been assigned to them, and that ruling is assigned as error and brought here for review.

The plaintiff bank contends that Eckert's attorneys charged him a fee of $1,000 in their contract with him, when they well knew that the property taken in the replevin action had been appraised April 10, 1934, as of the aggregate value of $915.

It is further charged by the bank that the contract between Eckert and his attorneys was entered into for the purpose of defrauding his other creditors, and that, as they had been attorneys for him from the beginning of the first case, they were well advised of his situation.

This court faces the question whether the judgment of the plaintiff and the judgment against the plaintiff obtained by the defendant arose out of the same subject-matter; and, if the two judgments arose out of the same subject-matter, can a judgment based on contract be offset against a judgment arising on tort?

Section 20-816, Comp. St. 1929, provides: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

One of the early cases is that of *Cooper v. Bigalow*, 1 Cow. 206. This case was decided by the New York supreme court in August, 1823. A set-off was pending at the previous term, but Bigalow, who was then in prison under the insolvent act, had assigned a judgment in his favor to his attorney. The court said: "The right of set-off had attached; and the attorney had full notice that it was claimed, at the time he took the assignment from Bigalow."

In *Kisthardt v. Betts*, 321 Pa. St. 270, 183 Atl. 923, the

defendants were permitted to set off their judgment against a judgment held by the plaintiff and assigned by the plaintiff to a third person in consideration of attorney's fees, notwithstanding defendants did not assert the right to set-off when plaintiff brought the suit. The court said: "The set-off of one judgment against another is not a legal right, * * * but is allowed by the courts under their inherent powers in the administration of justice and is governed by the principles of equity;" and adds that in Pennsylvania each case is to be determined on its own circumstances and merits.

The case of *Commercial State Bank v. Ketchum*, 1 Neb. (Unof.) 454, 96 N. W. 614, is quite in point. Commissioner Pound said: "Where a decree enjoining collection of a judgment and allowing a set-off against it, conditions the injunction upon payment into court of a sum more than sufficient to satisfy an attorney's lien upon such judgment, it is unnecessary to consider the relative priorities of the right to a set-off and such attorney's lien." This case is in point with the case at bar in that the plaintiff replevied certain personal property, but, by reason of the insufficiency of the affidavit, after a jury trial the defendant recovered judgment for the value of the property replevied, and after trial a decree was rendered allowing the set-off, but the court did not pass upon the priorities of the attorney's lien and the right to set-off. The defendant there was insolvent, and it is admitted that the defendant in the case at bar had no property left and was working in a café at Sidney.

The record in the case at bar clearly shows the insolvency of Eckert; and insolvency was recognized as sufficient ground for allowing set-off in *Wells v. Cochran*, 88 Neb. 367, 129 N. W. 533, in which it was held: "Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other." This controversy was

so close that it came to this court three times. Also to the same effect see *State v. Farmers State Bank,* 113 Neb. 497, 203 N. W. 629; *Rogers v. Buettgenback,* 114 Neb. 834, 211 N. W. 168; 7 C. J. S. 1197, sec. 232; *Thrall v. Omaha Hotel Co.,* 5 Neb. 295; 24 R. C. L. 806, sec. 14; 9 Neb. Law Bulletin, 346; *Jacobsen v. Miller,* 50 N. Dak. 828, 198 N. W. 349, and annotation as found in 34 A. L. R. 317.

The doctrine of set-off is of equitable origin, and not limited to demands which have been reduced to judgment. An unsatisfied judgment is a "thing in action" as respects statutory right to set off an assigned judgment against another judgment, and the assignee stands in same position as assignor at time of assignment. Where different claims arise in relation to the same matter, it is undoubtedly equitable that these equities should be arranged between the parties without reference to an attorney's lien, which is only on the clear balance due to his client after all the equities are settled. "If equities subordinate an attorney's lien to the right of set-off where there are two judgments in the same action, * * * it is immaterial that one may be founded upon contract and the other upon a tort." *Lee v. Sioux Falls Motor Co.,* 65 S. Dak. 401, 274 N. W. 614. See, also, *Yorton v. Milwaukee, L. S. & W. R. Co.,* 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

In *Field v. Maxwell,* 44 Neb. 900, 63 N. W. 62, it was held: "An attorney's lien for services performed in prosecuting an action is not measured by the amount which his client claims to be his due, but cannot exceed the amount in the hands of the adverse party belonging to his client or the amount owing to him, and is not paramount to any proper set-off or other available defense in such action." See, also, *Richardson v. Doty,* 44 Neb. 73, 62 N. W. 254; *Jones v. Driscoll,* 46 Neb. 575, 65 N. W. 194; *Stone v. Snell,* 86 Neb. 581, 125 N. W. 1108.

In the case at bar, the exact amounts of the judgments against each party have been determined by the court, and injustice is prevented by allowing a set-off. The plaintiff bank did not lose its right to a set-off because defendant

Eckert became insolvent, or because he had assigned the judgment he secured to his attorneys, as an attorney's fee of $1,000 for work that other attorneys testify was of the value of $150.

After reviewing all the facts in the case at bar, this court holds that the attorney's lien was subject to the right of the judgment debtor to set off its deficiency judgment. The trial court listened to the testimony of all the parties to this litigation, and had a full knowledge of the subject-matter, and held that the plaintiff had a lien upon the proceeds of the mortgaged property, even though it held that the plaintiff bank then had no present right to maintain the replevin action. The trial court was right in holding, under the rather peculiar facts in this case, that the judgment based on tort could be offset against a judgment arising on contract where both judgments arose out of the same subject-matter.

AFFIRMED.

ROY L. DUNN, APPELLANT, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLEE.
282 N. W. 487

FILED NOVEMBER 26, 1938. No. 30420.

1. **Evidence.** Parol evidence is inadmissible to prove a collateral or contemporaneous oral agreement to vary or contradict the terms of a written contract when it apparently embraces all the particulars necessary to make a complete agreement and is designed to express the whole arrangement between the parties.
2. **Contracts: CONSTRUCTION.** In determining the meaning of an indefinite or ambiguous contract, the interpretation or construction given it by the parties, while engaged in its performance before any controversy has arisen, is one of the best indications of its true intent and meaning, and the courts will ordinarily enforce such construction.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Foster & Yates, for appellant.

Cleary, Horan & Skutt, contra.

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action by an agent to recover from his principal the amount alleged to be due under an express agreement for hire. The plaintiff's petition consisted of four causes of action, the second of which was dismissed by plaintiff during the course of the trial. The trial court sustained plaintiff's motion for a directed verdict as to the third cause of action and a judgment was entered thereon. On the first and fourth causes of action the court directed verdicts for the defendant and from these orders the plaintiff appeals.

The evidence shows that plaintiff entered into a written contract with the Mutual Benefit Health & Accident Association of Omaha, hereafter referred to as the defendant, by which he agreed to represent the defendant as its general agent in the Great Falls district in Montana. As a consideration, plaintiff was to receive certain stated commissions on first premiums on policies based upon applications solicited by him in his territory, also the overwrite on all premiums based upon policies sold by his sub-agents, a collection fee on all premiums collected through his office in Great Falls and an overwrite collection fee on all premiums collected at points where the defendant company had not appointed local treasurers. The duties of the plaintiff were set forth in the contract in the following words: "In consideration of this appointment the second party hereby accepts said appointment subject to all provisions and conditions of this contract and agrees to devote his time and energy to the duties as agent for the association and to act exclusively for it and to advance its best interests subject to such instructions as have been or may hereafter be given by the association."

Plaintiff alleges that C. C. Criss, treasurer of the defendant company, during the negotiations with the plain-

tiff, orally agreed with plaintiff as follows: "That they would like to have him adjust and settle a few minor claims in Great Falls, Montana; that the adjusting of the claims would assist plaintiff in making contacts and help him to write insurance; that if the adjusting of the claims became burdensome or took up the time that he should be giving to the writing of insurance, that the company, in that case, would either send a claim adjuster to take care of the claims or would pay plaintiff additional compensation for his time and recompense him for his expenses." Plaintiff testified that he adjusted 2,157 claims for losses that were not covered by his contract of hire and that the reasonable value of his services in handling them was $10,000.

According to the evidence, plaintiff went to Great Falls and took over the office about June 10, 1930. The contract was not finally approved by an executive officer of the defendant, as required by the contract itself, until June 16, 1930. We are of the opinion that the alleged oral agreement cannot be admitted in evidence to contradict or vary the terms of the written agreement, it having been made as a part of the preliminary negotiations leading up to the making of the written contract. *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 75 N. W. 1092; *Crook v. O'Shea*, 126 Neb. 67, 252 N. W. 456; *Weidenfeld v. Olson*, 132 Neb. 303, 271 N. W. 806. The provisions of the contract heretofore set forth relating to the services to be performed by plaintiff are indefinite and uncertain in some respects. We know of no better way of determining the intent of the parties than by giving the contract the effect that the parties themselves gave it. Plaintiff worked under the contract for 33 months and during that time there were many acts and much correspondence which bear directly upon the meaning of the contract as the parties themselves construed it.

The record discloses that plaintiff took over the agency about June 10, 1930. On June 14, 1930, plaintiff wrote the company treasurer that "there were around one hundred unpaid claims on file in this office when I arrived." While

the plaintiff contends that these claims were taken in to the home office, nevertheless it appears that they were soon in his hands for handling. It is clear, therefore, that plaintiff commenced handling claims almost from the very beginning of the employment. This is established in a letter from plaintiff to the company treasurer under date of June 25, 1930, in which he said that we "have waded in with the result that we have the collections running along smoothly and the pending claims taken care of up to date."

On October 16, 1931, the assistant secretary of the company wrote to the plaintiff regarding a charge of $300 for the office equipment in the Great Falls office as follows: "We were informed further that your claim adjustments have been meeting with the approval of the claims committee and it seems quite likely that you are spending a good deal of time on them. In view of all this, and further in view of the fact that probably in the future you will be called upon to take care of unusual situations which might arise, we are asking the accounting department to relieve your account of the $300 charge and you will not be annoyed further about it."

On December 9, 1931, plaintiff wrote the company's agency director in part as follows: "There are many of the collections on accounts which are notified to pay this office who for some reason or other remit direct to the home office. We get nothing whatever by way of returns out of these accounts but we do get all of the claims to pay that arise from this very business who pay direct to the home office, and when I say that these claims take up 75% of our time, I am putting it mildly. Then too the postage is no small item in the handling of these claims. On the whole works where the business is paid direct into the home office we do not realize a cent. We have come to the place where we must get something for our work on claims and we don't know of any other source from which to expect it; if you do we would certainly be glad to hear from you."

On June 30, 1932, the company's superintendent of claims wrote the plaintiff as follows: "We have your letter with further reference to compensation for handling claims and in replying beg to advise that in view of the fact that we are in the midst of one of the greatest financial stringencies the country has ever known, during this time and in view of the fact that we find it absolutely necessary to cut salaries and expenses wherever possible, we do not feel that we could, right at this time, recommend any increase of expenditure on the part of the association."

And on August 23, 1932, plaintiff wrote the agency director of the company as follows: "This claim situation is very serious in Montana and I find it is the same all over the country. It takes practically all my whole time and as you know I don't get anything from settling claims but have to depend upon the collections and on the new business which I get off the territory."

We have examined all the correspondence in the record and nowhere does the plaintiff claim that he was entitled to additional compensation for handling claims under an agreement. We are of the opinion that the evidence quoted herein clearly indicates that plaintiff knew that he was to handle claims as a part of the services to be rendered under the written contract. He used the fact that the work on claims was excessive as a basis for obtaining the cancelation of the $300 charge for office equipment. He attempted to get his commission schedule increased for the same reason. He also requested financial assistance on his office overhead because of the volume of claims he was required to handle. He, likewise, requested that he be allowed commissions on collections sent direct to the company office as an additional compensation for his work in handling these claims. But at no time did he claim any right under an agreement to additional compensation for handling claims during the 33 months he was in defendant's employ. At various times he had the assistance of four claim adjusters sent out by the home office. As late as August 23, 1932, he wrote "and as you know I don't get anything

from settling claims but have to depend upon the collections and on the new business which I get off the territory." We are not unmindful of the fact that the contract was prepared by the defendant and that, in the event of ambiguity or indefiniteness, it would ordinarily be construed against the party making it. But the fact remains that both parties gave the contract the same construction during the whole period that the contract was in force.

Whether the handling of claims was a part of the duties to be performed by the plaintiff under his contract with the defendant is indefinite and uncertain and, in our opinion, constitutes an ambiguity. The evidence shows that, during the 33 months that plaintiff worked under the contract, both parties considered that the handling of claims was a part of plaintiff's duties under that part of the contract hereinbefore quoted. The court is entitled, we think, to place the same construction on the contract. The following rules of interpretation apply:

"In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be." 12 Am. Jur. 787, sec. 249.

"The interpretation or construction given contracts by the parties to them, while engaged in their performance before any controversy has arisen, is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction." *Hull Co. v. Westerfield,* 107 Neb. 705, 186 N. W. 992. See, also, *Ord*

Hardware Co. v. J. I. Case Threshing Machine Co., 83 Neb. 353, 119 N. W. 682; *Cady v. Travelers Ins. Co.*, 93 Neb. 634, 142 N. W. 107; *Farmers Ed. & Coop. Union v. Farmers Ed. & Coop. State Union*, 133 Neb. 397, 275 N. W. 464; 4 Neb. Law Bulletin, 149.

The parties having construed the contract as including the handling of claims during the 33 months that parties operated under it, the plaintiff cannot now urge a different interpretation. Whether the alleged oral agreement was admissible in evidence for any purpose in this case, it is not necessary for us to decide. In any event, the contract, whether it be that which was reduced to writing alone, or whether it be the written instrument as explained by the oral agreement, is subject to the construction placed upon it by the parties. The trial court was right in directing a verdict on the first cause of action.

Plaintiff also complains of the action of the trial court in directing a verdict against him on his fourth cause of action. The evidence discloses that defendant employed plaintiff as a claim adjuster, after he returned from Great Falls, at a salary of $150 a month. The fourth cause of action alleges that plaintiff was not paid for the month commencing June 10, 1932, and it is for this amount that he sues. The evidence disclosed that plaintiff did not adjust any claims following June 10, 1932. It appears that plaintiff was totally disabled on and subsequent to June 10, 1932, and that he performed no services for defendant during that period. Plaintiff was paid total disability benefits by the defendant company during the time of his disability. Upon this evidence, the trial court directed a verdict for the defendant, and, we think, correctly so. The plaintiff failed to make a case, and, under such circumstances, it is the duty of the court to direct a verdict.

The judgment of the trial court is in all respects correct and it is

AFFIRMED.

JOSEPHINE BARNARD, SPECIAL ADMINISTRATRIX, APPELLEE, v. OSCAR G. HEATHER, APPELLANT.
282 N. W. 534

FILED DECEMBER 9, 1938. No. 30426.

1. **Automobiles: RECKLESS OPERATION.** To constitute "reckless operation" of a motor vehicle, within the meaning of the "guest" statute of Iowa, the proof must be such as to justify a finding that the operator was proceeding without heed of, or concern for, the consequences. *Siesseger v. Puth*, 213 Ia. 164, 239 N. W. 46.
2. ———: ———. Evidence examined and analyzed, *held* insufficient to warrant the trial court in submitting the cause to the jury on reckless operation of motor vehicle by driver, within the contemplation of the Iowa "guest" statute. (Iowa Code 1935, sec. 5026-b1).

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

McKenzie & Dugan, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

MESSMORE, J.

This action was brought in the district court for Douglas county to recover damages for the death of plaintiff's intestate, alleged to have been caused by the reckless operation of the automobile of defendant in which plaintiff's intestate, her husband, was riding. The jury returned a verdict for the plaintiff in the sum of $3,250. Defendant appeals.

The pleadings admit the appointment of the plaintiff as the administratrix of her husband's estate, the accident, and the place at which it occurred. The pertinent allegations of plaintiff's amended petition relating to the cause of action may be summarized as follows: That the accident was due to gross negligence and reckless driving of the automobile by the defendant, in the matter of speed, management and control of his automobile, in attempting to pass

an automobile going in the same direction, and at the same time an automobile approaching from the opposite direction; in attempting to pass between the two automobiles, running in opposite directions; in failing to remain on the right-hand side of the road and properly control the automobile and keep careful and proper lookout; and in failure to see the automobile coming from the south towards the north, or the oncoming automobile, and in driving in a reckless and careless manner, in utter disregard of the safety of other persons having occasion to use the highway. Pertinent provisions of the Iowa Code are set out in the amended petition and later received in evidence.

The second amended answer of the defendant cites the guest statute (Iowa Code 1935, sec. 5026-b1), and alleges that the plaintiff's intestate was riding in defendant's automobile as a guest, by invitation and not for hire, as such statute has been construed by the supreme court of Iowa. The answer further denies that the accident was caused by any reckless operation of the automobile, as has been defined by the law of Iowa, or by any violation of the Iowa statute. The reply is a general denial.

On September 11, 1936, the defendant, Oscar G. Heather, the plaintiff's intestate, Ray O. Barnard, and one Hans J. Hansen left their homes in Omaha at 3:15 a. m. to go to Alexandria, Minnesota, on a fishing trip. The defendant was driving his 1934 Studebaker sedan. Seated at his right was the plaintiff's intestate, and Mr. Hansen was in the rear seat. The accident occurred about 7:45 in the morning on highway No. 75, a paved highway 18 feet wide, with seven-foot dirt shoulders, being the main highway from Sioux City, Iowa, to Minnesota, running directly north. The country is rolling, but the hills are not steep. The weather was clear and dry and the visibility good.

The most competent evidence relating to the accident is the testimony of John Beernink, a farmer, who was an eyewitness of the accident. Mr. Beernink lived about four miles southwest of Sioux Center, Iowa. On the morning of

September 11, 1936, he was driving his Ford V-8 automobile towards Sioux Center, going north and down-hill. The road leads downgrade several hundred feet to the bottom, and then starts upgrade. Mr. Beernink was driving at the rate of 40 miles an hour on the east side of the road. When about a mile and a half south of Sioux Center he saw a car coming from the north. Defendant's automobile was coming from the south, and was not noticed particularly by the witness until it was practically alongside of his Ford car. There was nothing unusual about the car and it was not making any noise. The automobile approaching from the north was at that time 75 to 100 feet from the Ford car. The defendant's car cut in sharply in front of the Ford car to avoid the car coming from the north; otherwise there would have been a head-on collision with the southbound car. The right rear fender of the Studebaker struck and dented the left front fender of the Ford car, jarring it slightly. Defendant's automobile then proceeded onto the shoulder on the east side of the highway, after swinging in front of the Ford car, and on making the turn to the east side of the road it continued to go north, its right wheels being from a foot to two feet off the paving, following the shoulder of the road on the east side for 30 or 40 feet. Defendant's car then swung over to the west side diagonally across the paving 40 or 45 feet. It upset in a ditch and rolled over two or three times. The speed of defendant's car was fixed by the witnesses at 35 or 40 miles an hour; the speed of the oncoming car from the north and of the Ford car at 40 miles an hour. The evidence further discloses that, at the time Mr. Beernink noticed defendant's car and the driver's attempt to go around the Ford car, Beernink tried to momentarily slacken his speed, in an attempt to slow down, to make more room for the Studebaker to pass in front of the Ford. The oncoming car from the north apparently did not slacken its speed; nor is there any evidence that the brakes were applied on any of the cars. Mr. Beernink could plainly see that defendant first tried to prevent the accident by

cutting in at his right and then made an effort to control the car and get it back onto the pavement. The driver of the southbound car and the driver of the Ford then went to the scene of the accident. No one in defendant's car said anything about how the accident happened. The driver of the southbound car left, and his evidence was never obtained. The plaintiff's intestate received a broken neck in the accident and died some 20 minutes thereafter in a hospital at Sioux Center.

The testimony of the sheriff, who arrived at the scene of the accident about 8:30 a. m., showing the course traveled by the defendant's car and its position on the road, would add nothing of particular advantage to the evidence, as no definite measurements were taken. The testimony of defendant discloses that he could see a mile and a half ahead, and certain portions of his testimony are set out by plaintiff, to the effect that the defendant did not pass any cars that he knew of; he did not see any car that he knew of before the accident happened or at the time of the accident; did not see or meet any cars; that he could not recall how he happened to go off the left-hand side of the road, and before the crash did not see anybody coming towards him; did not see a car between himself and the end of the mile and a half distance; that the view was clear; he did not know what occurred; did not recall seeing the Ford car ahead of him or any car from the north, and did not know how the accident happened. Defendant also testified, in substance, that he was not able to reconstruct in his mind all that happened; that he had tried to do so, and that he could not bring the happening of the accident or any of the events occurring at the time back to his mind; that he did not recollect seeing the car approaching him. There is also in the record evidence that defendant had no recollection of the accident. He was injured; the accident occurred in less than a second's time, and there is nothing unusual in defendant's testimony that he could not recall just what happened, when he was stunned a few moments after the accident. He had driven an automobile for 17 years.

The evidence of Hans J. Hansen is of little value as it relates to the accident. He was engaged in looking over road maps in the rear seat. One statement is attributed to this witness, when he said "Oscar, he got you," perhaps referring to the fact that he thought defendant's car had been sideswiped either by the southbound automobile or by the Ford car.

The town marshal of Sioux Center testified that he talked to the defendant; that defendant stated he was going at a rate of speed of 28 miles an hour. The witness testified: "Q. What else did he say? A. Then he said he passed a car that was ahead of him and turned in to the right to avoid a car coming from the north." On cross-examination the witness testified: "Q. He told you everything he remembered about the accident? Did he say anything about his car being sideswiped? A. He mentioned to me it looked like the car coming from the north sideswiped him. Either the northbound car or southbound car sideswiped him, was his idea." The foregoing facts, as disclosed by the record, are sufficient for an analysis of the instant case.

The appellant contends that the trial court erred in overruling defendant's motion for a directed verdict at the close of all the evidence.

Section 5026-b1, Iowa Code 1935, reads: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." That part of this statutory provision relating to intoxicating liquor is not involved in this case.

In *Siesseger v. Puth,* 213 Ia. 164, 182, 239 N. W. 46, 54, "Recklessness" under the guest statute is defined as " 'proceeding without heed of or concern for consequences.' To be 'reckless,' one must be more than 'negligent.' Recklessness may include 'wilfulness' or 'wantonness,' but if the conduct is more than negligent, it may be 'reckless' with-

out being 'wilful' or 'wanton,' but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies 'no care, coupled with disregard for consequences.'" The above case has been approved in *Neessen v. Armstrong*, 213 Ia. 378, 239 N. W. 56; *McQuillen v. Meyers*, 213 Ia. 1366, 241 N. W. 442; *Wilde v. Griffel*, 214 Ia. 1177, 243 N. W. 159; *Levinson v. Hagerman*, 214 Ia. 1296, 244 N. W. 307; and in every Iowa decision touching upon the guest statute, wherein the word "reckless" was necessary to be defined.

In *Mescher v. Brogan*, 272 N. W. (Ia.) 645, it was held: "'Recklessness' is conduct amounting to more than negligence and surrounding circumstances in each particular case must be considered in determining the question;" that, "In Iowa, there are no degrees of negligence;" and that the "Rule that 'recklessness,' within automobile guest statute, is more than negligence, means that recklessness is more than want of ordinary care, and does not necessarily mean that recklessness is conduct which transcends or goes beyond what is considered gross negligence in states recognizing degrees of negligence."

In the instant case there is no evidence of excessive speed on the part of defendant in driving his Studebaker sedan. The car coming from the north, 75 to 100 feet in front of the Ford car, or approximately the same distance in front of the Studebaker car, required the driver of the Studebaker to use that degree of care in an emergency as would be required of an ordinarily prudent man, under the circumstances, to avoid the accident. This the evidence discloses defendant sought to do, and elected to turn his car to the right in front of the Ford car. As a consequence, the car coming from the north went on, apparently untouched. The Ford car was jarred slightly. The defendant was probably guilty of negligence. At most, he might have been guilty of exercising poor judgment under the circumstances.

In the case of *McQuillen v. Meyers, supra*, it was said (p. 1368): "The court defined negligence, but charged that

the term 'recklessness' is a stronger one than negligence or want of reasonable care; that it indicates an indifference to consequences, a willingness to take a chance when there is present a perception of danger, and in the operation of an automobile signifies the driving of the car in heedless disregard of consequences; that it does not mean momentary thoughtlessness, inadvertence, or error in judgment." And in the case of *Wilde v. Griffel,* 214 Ia. 1177, 243 N. W. 159, the court, speaking of the guest statute, said (p. 1180):

"The evidence must disclose something from which recklessness could be legitimately inferred, and as the trial court said in his finding:

" 'If the only thing you can infer from the evidence is negligence, then the court should not submit the question to the jury. * * * It seems to me as if this statute, if it means what it says, means that the plaintiff must show some act as would be pronounced by every person as an utter indifference to the safety of the guest in his car.' "

Defendant cites the case of *Brown v. Martin,* 216 Ia. 1272, 248 N. W. 368. In that case three railroad men were on a hunting trip, riding in a Studebaker sedan. The plaintiff was in the seat next to the driver, and one man was in the rear seat. They left the paved highway, went onto a graveled road; the car immediately began to swerve, finally landing in a ditch. In the opinion the case of *Siesseger v. Puth, supra,* was quoted with approval, the court adding (p. 1276): "In this opinion it was also held that recklessness, within the meaning of the statute, was not a degree of negligence, but was something entirely beyond and distinct from negligence." And at page 1286 it was said: "Even if it may be said that the defendant should have reduced the speed of his car more than he did before going upon the graveled highway, there is nothing to show his failure to do so amounted to anything more than an error in judgment, and, regardless of the consequences, a mere error in judgment amounts to no more than negligence and is not recklessness."

We believe that the facts and circumstances in the case

at bar show that the defendant was not guilty of reckless driving, within the contemplation of the Iowa guest statute (Iowa Code 1935, sec. 5026-b1), and as determined by the decisions of the Iowa supreme court herein cited.

Plaintiff cites the case of *White v. Center*, 218 Ia. 1027, 254 N. W. 90, on the proposition: "Where a motorist collides on a paved highway with a wagon moving in the same direction in which he is going and which was plainly visible for a quarter of a mile, he may be held liable for reckless operation for injuries sustained by one riding with him as a guest;" and on the further proposition: "Where a motorist drives his automobile into an object upon the highway, which is visible for at least a quarter of a mile, he is guilty of reckless operation" of his automobile.

In the above-cited case the driver was on a straight, level stretch of a paved road on the right-hand side thereof, and could see in the road ahead of him, for at least a quarter of a mile, a team and wagon with a load of corn. He operated his car at a speed of 70 miles an hour and crashed into the rear of the wagon. The circumstances of this case presented a question for the jury of reckless driving and show a different situation than exists in the case at bar. There was no emergency in the *White* case as was presented in the instant case.

The case of *Bowermaster v. Universal Producing Co.*, 221 Ia. 831, 266 N. W. 503, wherein a judgment was reversed and the reason for reversal was testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record as not being true, conceding the plaintiff's right to the benefit of the most favorable view of the evidence rule, is of no assistance to the plaintiff in this case. The facts in the case of *Hart v. Hinkley*, 215 Ia. 915, 247 N. W. 258, are not analogous to the facts in the instant case; nor was the situation in any degree the same, which is also true of *Szetela v. Abramowicz*, 118 Conn. 697, 172 Atl. 852.

Plaintiff cites *Sanford v. Grady*, 1 Cal. App. (2d) 365, 36 Pac. (2d) 652, and *Goss v. Overton*, 266 Mich. 62, 253

N. W. 217, on the proposition of law: "A motorist may be guilty of reckless operation where he attempts to pass a car ahead when a third one is approaching from the opposite direction at close proximity."

In *Sanford v. Grady, supra,* the facts and circumstances disclose a determined effort on the part of the driver, who was passing a truck, traveling at the rate of 45 miles an hour, sounding his horn, and increasing his speed, to cut in quickly and run parallel with the truck, knowing that there would be an accident, and stating that it would be easier for the other car to pull out on the dirt than it would be for him to go around the rear of the truck, and not giving ground, and knowing that another car might possibly be coming up the hill, and plunging directly into the approaching car. This case presents a distinctly different state of facts than those in the case at bar.

In *Goss v. Overton, supra,* it was held: "Motorist is guilty of wilful and wanton misconduct where he drove car at speed of approximately 60 miles per hour over road with which he was very familiar and knew had been recently covered with loose gravel and struck telephone pole at curve he was unable to negotiate in his effort to avoid road scraper raising dense cloud of dust beyond which he could not see, and therefore trial court did not err in denying motion for judgment *non obstante veredicto* for guest passenger." We believe that a further statement of the case is unnecessary, in view of the circumstances presented in the case at bar.

The trial court was right in not submitting the proposition of a joint enterprise to the jury. There is some evidence that the deceased purchased seven gallons of gasoline at LeMars, and some evidence that the three men were to pay their equal shares of the expenses on the fishing trip. There is no further evidence as to a joint enterprise. The deceased was a guest of the defendant at the time of the accident, within the meaning and contemplation of the guest law of the state of Iowa. See *Clendenning v. Simerman,* 220 Ia. 739, 263 N. W. 248; *Park v. National Casualty*

Co., 222 Ia. 861, 270 N. W. 23; *Sullivan v. Harris*, 276 N. W. (Ia.) 88; *Askowith v. Massell*, 260 Mass. 202, 156 N. E. 875; *Reed v. Bloom*, 15 Fed. Supp. 600.

In the case of *Wion v. Hayes*, 220 Ia. 156, 261 N. W. 531, the court said (p. 161): "At the same time it was the duty of the district court to apply the doctrine adopted by this court, that a scintilla of evidence is insufficient to call for the submission of a case to the jury. *In re Estate of Work*, 212 Ia. 31, 233 N. W. 28. In *Schmidt v. Hayden*, 205 Ia. 1369, 219 N. W. 399, this court said: 'The direction of a verdict, in its last analysis, is always a question of the sufficiency of the evidence.'"

The trial court should have directed a verdict in favor of the defendant at the conclusion of all the evidence. The judgment is therefore reversed, and the cause dismissed.

REVERSED AND DISMISSED.

JOHN PRICHARD V. STATE OF NEBRASKA.
282 N. W. 529

FILED DECEMBER 9, 1938. No. 30478.

1. **Rape.** To warrant a conviction of assault with intent to commit rape, the circumstances, when taken together, must be of so conclusive a nature as to show the intent beyond a reasonable doubt, as required by the law of this state. *Krum v. State*, 19 Neb. 728, 28 N. W. 278.
2. **Criminal Law.** "While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty." *Larson v. State*, 110 Neb. 620, 194 N. W. 684.
3. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

Joseph E. Marsh and *George W. Leamer*, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Harry S. Grimminger, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

Plaintiff in error (hereinafter designated as defendant) was informed against under section 28-409, Comp. St. 1929, on two counts, for assault with intent to commit rape, found guilty on both counts by the verdict of a jury, and sentenced to the state penitentiary for a period of two years on each count, the sentences to run concurrently. He brings error to this court for a review of his conviction.

The prosecutrix, Thelma Babcock, 13 years of age, who had reached the fourth grade in the public schools, living with her father in South Sioux City, Nebraska, had known the defendant, John Prichard, for some years, he having been an occasional visitor in her home. On July 4, 1937, the defendant, a blacksmith of Hornick, Iowa, and a man 69 years of age, came to South Sioux City to pay the Babcocks a visit. During the course of the morning he had gone with Thelma to the park in town, where some ice cream and popcorn had been purchased and where he had given her 50 cents. She testified that at about the noon hour, in her home, the defendant made advances towards her, removed a part of her clothing, laid her on a mattress on the floor in the southwest corner of the room, and sought to consummate the act of intercourse. The purported corroborating testimony of the prosecutrix was that of the witness, Annie Perkins, who stated that she passed the front door of Thelma's home at about noon, not stopping, and saw the defendant with Thelma on a bed; that she was a foot from the front door which was open, or three steps from the door. She testified specifically that she saw the defendant and the prosecutrix together on the bed. Thelma testified that the bed was in the southeast corner of the room. Annie Perkins further testified that she went over to the home of a neighbor, passing Thelma's home, at

8 or 9 o'clock in the morning, and again testified that it was early in the morning. She told some one at the neighbor's house to inform Thelma's father. He came home immediately, but nothing was said by him about the matter; nor was he called as a witness. The foregoing constitutes the pertinent facts relating to the first count, as charged in the information.

The second offense was alleged to have taken place on December 27, 1937, in the Babcock home, at or about the noon hour, and at that time defendant had made arrangements to board and room at the Babcock home, paying one-third of the household expenses and giving Thelma's father the use of his automobile. Mildred Davenport, a girl 16 to 18 years of age, had come to the Babcock home one week before Christmas and remained for about a week thereafter. She was the housekeeper and prepared the meals, and did the housework, receiving therefor a wage of $2 a week. On the day in question, she testified, the defendant unrolled a mattress, placed it on the floor, directed Thelma to lie down, removed a certain portion of her clothing, and sought to perform the act of intercourse; they stayed on the mattress for 20 minutes. There is a discrepancy in the evidence as to just what Mildred was doing at the time, Thelma stating that she was reading and was told by the defendant not to look that way, and the witness stating that she was eating when it started and later when it was finished she was washing the dishes. She further testified that on several occasions she had seen defendant do the same thing; that she hesitated to tell Thelma's father about the matter, and about two weeks later told the facts to a neighbor, who was a friend of the Babcock family, and also told Thelma's father. The charge against the defendant was filed January 15, 1938.

There is in the record the testimony of a physician, Dr. C. W. Neill, a witness for the state, not called in the state's behalf, but called by the defense. He testified for defendant, stating that he examined Thelma on February 11, 1938. His testimony follows: "Q. Just state to the jury what your

examination revealed. A. External examination showed the external genital parts of a child about twelve years old, perfectly normal in appearance; and, on examination, with an intact hymen. Microscopically the examination showed the normal germs that appear in the vagina, with no diseased condition. Q. In other words, it showed it had not been penetrated? A. I think so; yes." On cross-examination he testified: "Q. In other words, similar to the organ of a normal child of about that age? A. Yes. Q. And you from your examination couldn't tell whether there had been any attempt to insert such an organ? A. Apparently not, because there would have been some tear there if there had been much of an attempt. The hymen is a very fine, thin, friable membrane, and wouldn't take much to rupture. Q. You wouldn't know from your examination whether there could have been some attempt? A. I don't think so."

In the case of *Larson v. State,* 110 Neb. 620, 194 N. W. 684, the court said: "If complainant was abused, as charged in the information, it is reasonable to believe that a physical examination, of a person of her age, would have afforded some corroborative evidence of the charge of mistreatment, though it would not, of course, be conclusive against the person charged without other corroboration."

In view of the testimony of the physician, as above set out, and evidence that defendant had laid hands on the prosecutrix, and that she had resisted him, and considering the numerous times, according to the testimony, that defendant assaulted prosecutrix with the intent to commit rape, if such acts had been committed, there would have been some instances of torn clothing or some marks on the body of the prosecutrix.

An analysis of the evidence shows that the prosecutrix was of limited mentality, and by leading questions she was permitted to testify to the offenses as charged against the defendant. Her testimony contained many discrepancies and inconsistencies and was far from being stated with that degree of continuity that might be expected in cases of this nature, in view of the leniency in the admissibility

of evidence, as shown by the record. The testimony of Annie Perkins as a corroborating witness to the first offense, as charged, on July 4, has been hereinbefore set out and analyzed. The testimony of Mildred Davenport, relating to the offense, as charged, on December 27, is not entitled to serious consideration, in view of all the other circumstances, and especially in view of the testimony of Doctor Neill and the indefinite testimony of the prosecutrix. The witness Davenport made no attempt to protect this child, when the mattress was being unrolled and placed on the floor so that the defendant might assault Thelma, with intent to rape her. This witness was in charge as the housekeeper. On the several occasions on which the defendant, the witness stated, acted in the same manner towards Thelma, not one word of complaint came from her lips. There is nothing in the record to show that she was in fear, nor was she threatened, and there was, apparently, no reason or excuse, if the defendant did so conduct himself in the manner as charged, why this witness should have remained silent. There had been trouble between Thelma's father and the defendant over a board bill. This witness knew the exact amount of the bill and of the trouble between the two men. Her evidence, in its entirety, is insufficient in corroborating the evidence of the prosecutrix, as proof, beyond a reasonable doubt, that the defendant assaulted Thelma with intent to rape her.

At the conclusion of the evidence, the defendant moved to dismiss counts 1 and 2 of the information, on the ground that the offense was not proved beyond a reasonable doubt, and for the further reason that there was no corroboration of the prosecutrix. This motion was overruled, which necessarily requires a review and an analysis of the evidence which we have heretofore set out.

The state relies on the case of *Fager v. State*, 22 Neb. 332, 35 N. W. 195, wherein it was held: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense.

It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn."

The above statement of the law has been indorsed by this court consistently in other decisions, and is cited with approval in the case of *Beer v. State,* 129 Neb. 366, 261 N. W. 824. In the latter case, in the body of the opinion, the court, at page 369, discussed an instruction, given by the trial court, "that, if one with the power of copulation 'touches or handles, or takes hold of the person of a female under the age of consent with the present intention of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape.' " The foregoing is a proper pronouncement of the law in this respect.

In 52 C. J. 1104, it is said that the word "corroboration" means "testimony of some substantial fact or circumstance independent of the statement of the prosecutrix." "The corroborative evidence must be something more than a mere colorable support. It is sufficient if the corroborating evidence tends to strengthen and corroborate the prosecutrix in connecting defendant with the commission of the offense, and there is a failure to corroborate the prosecutrix if there is no evidence legitimately having that effect."

In *Boling v. State,* 91 Neb. 599, 136 N. W. 1078, this court held: " 'In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.' *Mott v. State,* 83 Neb. 226."

In the early case of *Krum v. State,* 19 Neb. 728, 28 N. W. 278, this court held: "To warrant a conviction in such case (of assault with intent to commit rape), the circumstances when taken together must be of so conclusive a nature as to show the intent beyond a reasonable doubt."

In the case at bar, the evidence is not of such a conclusive nature as to show the intent, on the part of this defendant, beyond a reasonable doubt, as required by the law of this state.

Public sentiment seems inclined to believe a man guilty of any illicit sexual offense with which he may be charged, and it seems to matter little what his previous reputation has been. This natural tendency may be due to the fact that, where a female child is involved and a man is charged with unlawful interference with her, by necessity, it casts odium upon the child, as well as charging the defendant with a felony. Be this as it may, where an assault with intent to commit rape is charged, the law requires that the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence, in order to constitute conviction. See *Roberts v. State,* 106 Neb. 362, 183 N. W. 555. We do not believe that Thelma Babcock's testimony has been corroborated in this instance.

In *Larson v. State, supra,* this court held:

"Opportunity alone, to commit the crime of rape, is not corroboration of the evidence of the complainant.

"While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty."

Upon a review of the entire record, we conclude that the verdict is not supported by the evidence, and that the motion of defendant made at the conclusion of the evidence should have been sustained.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

The prosecution in this case wherein defendant, an unmarried man 69 years of age, was convicted of assault with intent to commit rape upon prosecutrix, a female child 13

years of age, is not triable *de novo* in the proceeding in error to review the conviction.

There was direct and positive evidence of defendant's guilt. The jurors composed the tribunal appointed by law to determine whether the witnesses for the state told the truth. The credibility of the witnesses was a question for the jury. They found that the witnesses for the state told the truth and they disbelieved the witnesses who testified to a different story. The trial court sustained the verdict. The jury and the trial court heard the witnesses and observed them as they testified. They had better opportunities than the reviewing court for determining credibility. If the signatures of falsehoods were written in the countenances of witnesses who testified for defendant, the appellate court is not thus enlightened by the record. The circumstances do not convince me that the state failed to prove the guilt of defendant beyond a reasonable doubt. In my opinion the province of the jury is invaded by the decision which gives credence to the testimony of witnesses for defendant and rejects as false evidence of guilt.

My understanding of the law is that, in absence of legislation, the adoption of the rule that corroboration of prosecutrix is necessary to a conviction for assault with intent to commit rape is a usurpation of power exercised only in Nebraska and New Mexico. The power to review criminal prosecutions and convictions comes from three sources—Constitution, legislation and common law. In no one of these is a Nebraska court empowered to make corroboration of prosecutrix necessary to a conviction for assault with intent to commit rape. On this subject I adhere to my dissent in *Gammel v. State,* 101 Neb. 532, 540, 163 N. W. 854. If corroboration could lawfully be required, however, it is abundant in the record as I view it.

WILLIAM R. LINCH, APPELLANT, V. JOE F. BERGGREN, EXECUTOR, APPELLEE.
282 N. W. 528

FILED DECEMBER 9, 1938. No. 30369.

1. **Appeal.** When a law action is tried to the court, findings of fact have the same effect as findings of a jury and will not be set aside unless clearly wrong.
2. **Evidence.** Trier of facts is judge of credibility of witnesses and may give greater weight to testimony of one witness than to that of a greater number of witnesses, if such testimony is deemed entitled thereto.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

J. Jay Marx and *C. J. Campbell,* for appellant.

Peterson & Devoe and *Jack Devoe, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

Appellant, hereinafter referred to as plaintiff, commenced this action in the municipal court of the city of Lincoln against the appellee, hereinafter referred to as defendant, and from an adverse judgment in municipal court took an appeal to the district court for Lancaster county, Nebraska. A jury was waived and trial had to the court. The only issue presented to the trial court was whether there had been an account stated.

The testimony of the plaintiff, which was corroborated by his brother, was to the effect that on May 6, 1932, the parties met at a bank in Lincoln at which time it was mutually agreed that there was a balance of $517.42 due the plaintiff. The defendant denied that he had agreed upon a balance due, and testified that on May 6, 1932, he indorsed and delivered to plaintiff a certain hail loss check and at that time informed plaintiff that the payment then made constituted an overpayment of the amount due.

Upon this conflicting testimony, the trial court found

that plaintiff had failed to sustain the burden of proof and rendered judgment in favor of the defendant. From this finding and judgment this appeal is prosecuted.

The plaintiff's principal assignment of error is that the judgment is not sustained by the evidence.

It has been the uniform holding of this court that, where a jury is waived in an action at law, the court's findings have the same effect as a verdict of the jury and will not be set aside on appeal unless clearly wrong. *Bank of Roca v. Meyer, ante,* p. 128, 280 N. W. 449; *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829.

The most that can be said for plaintiff's position in this case is that he produced two witnesses to support his theory of the case and the defendant produced but one. However, it has always been the rule in this state that the trier of facts may give to the testimony of one witness greater weight than that of a greater number of witnesses, if such testimony is deemed entitled thereto. In this case, the trial court observed the witnesses and evidently believed the testimony of the defendant.

There being no error in the record, the judgment is

AFFIRMED.

GATE CITY COMPANY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

282 N. W. 532

FILED DECEMBER 9, 1938. No. 30429.

1. New Trial. "In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.,* 88 Neb. 687, 130 N. W. 567.
2. Courts. "The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by their

solicitude for the rights of litigants, but also by considerations of justice to themselves as instruments provided for the impartial administration of the law." *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35.

3. ———. Where, during the term at which a judgment was rendered, the court is informed and convinced that the judgment is unjust due to fraud practiced by the prevailing party, the court has inherent power, and it is its duty, to set such judgment aside and grant a new trial.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed.*

James T. English and *Thomas C. Quinlan*, for appellant.

Leigh & Krajicek, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

On September 28, 1937, the board of county commissioners of Douglas county, Nebraska, passed its resolution disallowing the claim of the Gate City Company, hereinafter referred to as plaintiff, on account of coal furnished by said company to the county, hereinafter referred to as defendant, between January 1, 1937, and September 16, 1937, the reason given being that the funds levied for such purpose had been exhausted. Notice of appeal was duly given, and on October 4, 1937, the plaintiff filed its transcript on appeal in the district court for Douglas county, and in its petition alleged that between the dates stated it had furnished coal for the use of the defendant, and that the reasonable market value of said coal was $15,305.35, no part of which had been paid. The county attorney of Douglas county, under instructions of the county board, filed an answer on behalf of the county in which he admitted delivery and acceptance of the coal in question, and further admitted that the amount of the claim was the reasonable market value of the coal furnished. On October 21, 1937, a hearing was had resulting in a judgment in favor of the plaintiff in the sum of $15,859.47. On De-

cember 13, 1937, a motion for new trial was filed by the defendant on the ground of newly discovered evidence, supported by numerous affidavits. The term of court at which said judgment had been rendered had not adjourned *sine die* at the time the motion for new trial was filed and was not adjourned until February 5, 1938. The affidavits in support of the motion for new trial are substantially alike and consist of statements by various coal dealers operating in Douglas county, Nebraska, to the effect that between January 1, 1937, and September 16, 1937, the fair market value of coal such as was delivered by plaintiff to the defendant was from a minimum of $1 to a maximum of $2.45 a ton, whereas the plaintiff had made a charge of from $3.54 to $4.14 a ton. On February 5, 1938, the district court for Douglas county entered an order overruling defendant's motion for new trial and it is from this order that this appeal is prosecuted.

It is the contention of the defendant that the court erred in overruling its motion for a new trial based upon newly discovered evidence which it could not, with reasonable diligence, have discovered and produced at the trial; and the contention of the plaintiff is that the defendant has wholly failed to show that it exercised reasonable diligence in endeavoring to obtain the evidence and, in addition, that, having admitted in its answer that the fair market value of the coal was as claimed by the plaintiff, the evidence would have been incompetent had it been offered.

With these contentions of the plaintiff, we are agreed. This court has repeatedly held that, in order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been discovered must be such that it could not with reasonable diligence have been discovered and produced at the trial. *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298; *Buzzello v. Sramek*, 110 Neb. 262, 193 N. W. 743.

In this case, there is no such a showing. On the contrary, the most obvious source of information as to the fair market value of coal in Douglas county would be the

dealers in that commodity. There is no showing that an effort was made to obtain this information from any of the dealers in Douglas county or from any other source, and the newly discovered evidence set out by defendant consists almost exclusively of information furnished by such other coal dealers. In addition, the defendant in its answer admitted that the amount claimed by plaintiff was the fair market value of the coal in question, so that, under the pleadings as they then stood, the evidence would have been incompetent had it been produced and offered. It follows that the ruling of the trial court was correct in denying a new trial on the ground of newly discovered evidence.

However, the showing made in support of defendant's motion for new trial was such as to apprise the court of the fact that, instead of representing the fair market value of the coal delivered, the claim of the plaintiff was excessive and, in one transaction, represented a profit to the plaintiff of 254 per cent.

While courts will not ordinarily interfere after judgment has been entered against a party upon its own admission, nevertheless, there is an exception to this rule, and that is where such party is a corporation or public body and, of necessity, is represented by agents. If, in such case, due to fraud practiced by the prevailing party, a judgment is entered that is unjust, the courts have inherent power to set such judgment aside upon such facts being made known. 15 R. C. L. 706, sec. 158.

In this case, information was brought to the court during the term at which the judgment was rendered of such a nature as to inform the court that one of the parties had practiced a fraud upon the other. Under those circumstances, the court had the inherent power, and it was its duty, on its own motion, to set the judgment aside and to grant a new trial.

As was said by this court in the case of *Weber v. Kirkendall,* 44 Neb. 766, 63 N. W. 35: "The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is in-

herent in all courts of general jurisdiction to correct errors committed by them which are clearly prejudicial to the parties, and their power in that respect is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law."

We conclude that, although counsel for defendant designated the proceeding as a motion for new trial on account of newly discovered evidence, in substance and effect, it was a motion to set aside the judgment on the ground of fraud practiced by the successful party and, as such, it should have been sustained.

For the error herein pointed out, the judgment of the trial court is

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1939

WALTER H. JURGENSEN v. STATE OF NEBRASKA.

283 N. W. 228

FILED JANUARY 4, 1939. No. 30388.

1. **Criminal Law.** Harmless error in a criminal prosecution is not a ground for the reversal of a conviction.
2. ———: INSTRUCTIONS. Embezzlement is a felony which may be defined in an instruction to the jury in language equivalent to the language of the statute.
3. ———: ———. The reviewing court should consider all the instructions given to the jury in determining whether a particular instruction is prejudicially erroneous.
4. **Embezzlement.** A principal's money, received and fraudulently appropriated by his agent to his own use in violation of the terms of the Nebraska statute on embezzlement, includes money "which shall have come into his or her possession or care, in any manner whatsoever." Comp. St. 1929, sec. 28-544.
5. **Criminal Law.** Where the trial court has instructed generally on, and stated fully, all the issues in a criminal prosecution, error cannot be predicated on failure to give an instruction on a particular phase of the case unless a proper instruction thereon was requested.
6. **Embezzlement:** INTENT: PROOF. In a prosecution against an agent for embezzlement of his principal's money, intent to defraud is an element of the felony charged and may be proved by circumstances, including methods of business and transactions of the agent in perpetrating the fraud and similar transactions with others at or near the time of the felonious act charged.
7. **Criminal Law.** Where the trial court strikes testimony of wit-

nesses from the record during the trial, directs the jury to disregard it and gives an instruction that it cannot be considered, its admission is not reversible error unless the record for review shows that the complaining party was prejudiced.

8. ———: VENUE. In a prosecution for embezzlement, evidence summarized in opinion *held* sufficient to prove venue in the county where defendant was tried.

9. **Embezzlement.** The managing officer of a corporation by operating through it in committing a felony does not thus secure personal immunity from the statutory penalty therefor.

10. ———. Where a principal entrusts property to his agent for a particular purpose and the agent embezzles it, a subsequent intent, an offer or agreement to make restitution does not defeat a prosecution by the state for the embezzlement.

ERROR to the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Richard F. Stout and *Jay O. Rodgers*, for plaintiff in error.

Richard C. Hunter, Attorney General, Bert L. Overcash and *Max G. Towle, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

In a prosecution by the state of Nebraska in the district court for Lancaster county, Walter H. Jurgensen and Jules H. Johnson, defendants, were charged with embezzlement in violation of the statute which provides:

"If any clerk, agent, attorney at law, servant, factor or commission agent of any private person or any co-partnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, shall embezzle or convert to his own use, fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use, without

the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action or other valuable security or effects whatever, belonging to any other persons, body politic or corporate, or which is partly the property of any other persons, body politic or corporate, and partly the property of such officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, which shall have come into his or her possession or care, in any manner whatsoever, or if any officer elected or appointed to any office of public trust in the state, or if any executor, administrator, guardian or assignee for the benefit of creditors shall embezzle or convert to his or her own use any money, property, rights in action or other valuable security or effects whatever belonging to any individual or company or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken or secreted or of the value of any sum of money payable or due upon any right in action so embezzled." Comp. St. 1929, sec. 28-544.

The county attorney of Lancaster county, acting for the state, presented the information which charged that defendants, on or about September 11, 1934, in the county of Lancaster and state of Nebraska, then and there—

"Not being apprentices or persons within the age of eighteen years, and then and there being the agents of one Chester C. Kaderli, of Potter, Nebraska, a private person, then and there, by virtue of their employment as such agents of said private person, did receive and take into their possession Nine Hundred Sixteen and no/100 Dollars ($916) in money, of the value of Nine Hundred Sixteen and no/100 Dollars ($916), the personal property of the said Chester C. Kaderli, and then and there unlawfully, feloni-

ously and with intent to defraud the said Chester C. Kaderli, did convert to their own use and embezzle said money, without the assent of the said Chester C. Kaderli, their principal and employer, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

Upon a separate trial of Walter H. Jurgensen, defendant, who had pleaded not guilty, the jury rendered a verdict against him in the following form:

"We, the jury, duly impaneled and sworn in the above entitled cause do find the defendant guilty as charged in the information and we do find the amount embezzled to be the sum of $549.71."

For that felony defendant was sentenced to serve in the penitentiary a term not less than two years nor more than five years.

As plaintiff in error, defendant presented to the supreme court for review the record of his conviction.

It is first argued on behalf of defendant that the conviction must be reversed on the ground that the trial court erred to his prejudice in giving instruction No. 9 to the jury, as follows:

"(1) That on or about September 11, 1934, one Chester C. Kaderli was the owner of certain shares of building and loan stock then having a fair and reasonable market value in money;

"(2) That on or about that date the defendant, then being a person of more than 18 years of age, together with one Jules H. Johnson, his employee, received such building and loan stock into their possession from said Kaderli for the purpose of exchanging it for municipal or government bonds or other securities satisfactory to him upon inspection thereof;

"(3) That defendant thereafter in Lancaster county, Nebraska, without Chester C. Kaderli's consent and with intent to defraud him, used some part or all of said building and loan stock, or the money received therefrom, for his own purposes, use or benefit, or for the purposes, use

or benefit of a corporation or some other agency of which he, the defendant, was then an officer.

"If the state has established each and all of these material allegations and elements by the evidence beyond a reasonable doubt, then you will find the defendant guilty as charged in the information. If the state has failed to establish by the evidence beyond a reasonable doubt any one or more of such material allegations and elements, then you must find the defendant not guilty."

The third paragraph or fragment of this ninth instruction is challenged as permitting the jury to find defendant guilty, if he embezzled "building and loan stock" under the information which charges alone the embezzlement of "money." The specific language condemned by defendant as prejudicially erroneous is: "Used some part or all of said building and loan stock, or the money received therefrom, for his own purposes." It is insisted that the jury were thus permitted to convict defendant of an offense with which he was not charged, in violation of his constitutional right to notice of the nature and cause of the accusation against him, to notice of the exact property involved in the charge of embezzlement, and to notice of the facts upon which the state relies for conviction. It is asserted that these rights were invaded by the instruction permitting a conviction for embezzlement of building and loan stock. The assigned error in this instruction was skillfully argued at the bar and in the brief and precedents in which accused defendants in other prosecutions were protected from convictions for offenses not charged were cited and analyzed by counsel for defendant.

Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting ab-

solute perfection in bringing malefactors to justice. A statute relating to the review of criminal prosecutions reads thus:

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

An "examination of the entire cause" to determine whether there was a prejudicial misdirection of the jury in the case at bar required scrutiny and consideration of four large volumes of proceedings and evidence. Defendant was president of both the United Savings and Loan Association and the Western Union Life Insurance Company with offices in the city of Lincoln. Jules H. Johnson, when agent of the insurance company, September 11, 1934, knowing that Chester C. Kaderli, railroad station agent at Potter, Nebraska, had stock and deposits in the loan association, approached him in the railroad ticket office there and by false representations procured from him his loan association stock and the pass-book evidencing his deposits—valuable property. Kaderli accepted a receipt in the following form:

"Sept. 11, 1934.

"Received of Chester C. Kaderli, Cert. #733 to apply on the sum of Twelve Hundred Dollars on account of the Investment Bond described in the subscription to which the above name is signed. Bonds to be delivered personally and be satisfactory before B. & L. deposits transferred. (This receipt is valid only for payments made payable to the company.)

"The Western Union Life Insurance Company,
"By J. H. Johnson, Salesman."

On the margin of the receipt as it appears in the record are the following entries in ink: "Pass-book, $844.75; card, $870.50; received, $916.17."

Kaderli entrusted his loan association stock and deposits to Johnson, the insurance company and the defendant for the purpose of having them exchanged for government or municipal bonds or other securities satisfactory to Kaderli. The exchange was never made. What Johnson received was never returned to Kaderli. The latter never received in exchange any bonds or other securities satisfactory to him or other compensation or consideration of any kind for his loan association stock or deposits. After he parted with the property entrusted to his agents for the purpose stated, it was sold and part of the proceeds credited in dollars and cents to the "Western Union Agency" by its book entries, that name being one in which defendant transacted business. The bill of exceptions contains cogent evidence of facts thus summarized. The information charged that defendant embezzled $916 in money belonging to Kaderli. The trial court in the first instruction given directed the jury in language equivalent to the language of the statute that defendant was charged with the embezzlement of $916 of Kaderli's money. The instructions defined the statutory crime of embezzlement, including all the elements thereof, required proof of each element beyond a reasonable doubt, and directed the jury: "You must arrive at your verdict solely from the evidence adduced in open court."

It is well settled law that a felony may be defined in an instruction to the jury in the language of the statute. *Harrison v. State*, 133 Neb. 794, 277 N. W. 96. During a long trial the jury heard evidence that money was the subject of the embezzlement charged. Documents and oral testimony proved that Kaderli, for two years or more, had importuned defendant for money, making vehement demands for it repeatedly by letter, by telegram and by appeal in person. Before the examining magistrate, after the prosecution was commenced, defendant offered to make restitution by tendering Kaderli about $470 in money. The jury necessarily knew that money was the subject of the embezzlement charged. They did not find defendant guilty of embezzling building and loan stock or guilty of larceny

or guilty of obtaining money by false pretenses. They found him guilty of embezzling money as charged in the information. Their verdict already quoted herein so shows. The reviewing court should consider all the instructions given to the jury in determining whether a particular instruction is prejudicially erroneous. *Harrison v. State,* 133 Neb. 794, 277 N. W. 96. So considered, it is clear that defendant was not prejudiced or the jury misled to his injury by the language in paragraph three of the instruction under consideration.

Instruction No. 9 is also challenged as assuming to give directions on all the elements of embezzlement, while omitting to instruct the jury to acquit defendant unless he formed the intent to embezzle Kaderli's money after he received it. This position is untenable in a proper view of the entire record. Before the assailed instruction was given, the court had defined in other instructions all the elements of the crime charged under the Nebraska statute. It was apparently given to enlighten and caution the jury further on the transactions through which defendant procured money belonging to Kaderli. A principal's money, received and fraudulently appropriated by his agent to his own use in violation of the terms of the Nebraska statute on embezzlement, includes money "which shall have come into his or her possession or care, in any manner whatsoever." Comp. St. 1929, sec. 28-544. Since the instruction as a whole properly stated the law on all the material issues, the failure to instruct in addition that there could be no conviction, unless the criminal intent was formed after defendant received the money, is not a ground for reversal, a proper instruction to that effect not having been requested. The rule applicable has been stated as follows:

"Where the trial court has instructed generally as to the issues in a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." *Martin v. State,* 67 Neb. 36, 93 N. W. 161. Followed in *Frades v. State,* 131 Neb. 811, 270 N. W. 314.

The instructions as a whole made it clear to the jury there could be no conviction unless the state proved beyond a reasonable doubt that defendant received and with fraudulent intent embezzled or converted to his own use, without the assent of Kaderli, money belonging to him. The assignments of error directed to instruction No. 9 are therefore overruled.

It is confidently argued on behalf of defendant that there is no competent evidence to sustain the verdict, since, as contended, criminal intent essential to embezzlement is not proved beyond a reasonable doubt. On the witness-stand defendant admitted he was indebted to Kaderli as a result of the transactions between them; said in substance he did not intend to embezzle money belonging to Kaderli; still intends to pay him what he owes him. The theory of the transactions as explained by the testimony of defendant is that they created no more than a civil liability from one individual to another and did not make him answerable to the state for a felony. In this connection assignments of error are directed to testimony as to what defendant regards dissimilar transactions to prove criminal intent. In the enactment of the embezzlement statute, the lawmakers did not contemplate the defeat of the legislative purpose by technical refinements of evidence directed to criminal intent. The convolutions and fibers of a human brain in which a criminal intent is created do not give oral expression to the mental operation. Concealment is often necessary to the accomplishment of an evil design. The person who can testify directly to criminal intent in a criminal prosecution is generally the accused, who may decline to incriminate himself. The state may resort to circumstances for proof of intent. Deliberate acts of an accused agent may throw some light on the intent by which he was prompted to defraud his principal. An adult sane person may be presumed to intend the natural and probable consequences of his voluntary acts. *Ford v. State,* 46 Neb. 390, 64 N. W. 1082. Surrounding circumstances may disclose the truth. The difficult problem of proving criminal intent was explained in a recent embezzlement case as follows:

"It is further contended by the defendant that the evidence is insufficient to sustain a verdict of guilty. This argument is based on the proposition that the state has failed to show beyond a reasonable doubt the intent of the defendant to defraud the owner of the funds alleged to have been embezzled. It must be borne in mind that the intent with which an act is done is purely a mental process and hard to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances." *Buckley v. State,* 131 Neb. 752, 269 N. W. 892.

In a case wherein a banker was accused of embezzling money of the bank, a former opinion contains the following language in a proceeding in error:

"The record of the trial discloses that the state, over the defendant's objections, was allowed to introduce evidence of his manner of conducting the business of the bank, and of many of his transactions with that institution occurring at different times, many of them long prior to the time when the offense for which he was on trial is alleged to have been committed; and it is contended that this was reversible error. This contention cannot be sustained, for it has often been held, on principle and precedent, that the state in such cases may introduce evidence of separate and distinct acts or transactions, which may be embezzlement in themselves." *Chamberlain v. State,* 80 Neb. 812, 115 N. W. 555.

As tending to prove the intent necessary to guilt under the charge of embezzlement, the trial court admitted evidence of other transactions to the effect that the insurance company of which defendant was president, through its agents, or by defendant himself, fraudulently procured without adequate consideration and retained or sold valuable building and loan stock or other property of the owners. There were too many of these independent transactions in evidence for separate discussion in an opinion of reasonable length, but each has been examined with care in connection

with the entire record. In defendant's methods of transacting business and in respect to frauds committed, the similarity of the independent transactions on the issue of intent and the transactions in the case at bar were such as to make them admissible under the rules of evidence already stated. The purpose of evidence of this nature was limited by the trial court in an instruction as follows:

"The court permitted the state to introduce evidence of alleged similar acts at or about the same time that the act charged is alleged to have been committed, and all this evidence is to be considered by you only for the purpose of showing the intent of the accused in the particular act charged in the information and for no other purpose."

Evidence of independent transactions was not only properly admitted, but defendant's rights were protected by the limitation quoted.

Under a different assignment of error it is contended that unremovable prejudice in the minds of the jurors was created by testimony of still other witnesses on dissimilar acts of defendant. This testimony was not only stricken out at the trial, but the jury were told in a formal instruction: "You cannot consider any evidence which has been stricken out of the record by the court during the trial." There is no logical reason for assuming that the jury disregarded the instruction of the court and considered testimony not before them. The record contained proper and more convincing testimony of transactions similar to one in issue. The contention is without merit.

Defendant insists further that the conviction should be reversed and the prosecution dismissed on the ground that the state did not prove the felony charged was committed in Lancaster county where he was tried. The information and the instructions laid the venue in Lancaster county. The head offices of both corporations of which defendant was president were in Lincoln, Lancaster county. He transacted corporate and personal business there. Kaderli's bonds were transferred in Lancaster county and part of the proceeds were credited in money to the "Western Union Agency" on

its books in Lincoln and that agency, according to the evidence, was defendant. He had possession of the bonds and of proceeds of the bonds in Lincoln. Kaderli in person demanded his money from defendant in Lincoln and never received it. That the intent to embezzle was conceived in Lancaster county, where possession of the money was obtained and the felony perpetrated, was a proper deduction from the evidence.

The evidence was discussed at length by counsel for defendant and the conclusion reached that it was insufficient to sustain the verdict, but the opinion of the court to the contrary is unanimous. Nothing in the record or arguments has been overlooked. The evidence herein outlined in the discussions of the assignments of error shows substantial grounds for the verdict of the jury. The president of corporations by acting through them in committing a felony does not thus secure personal immunity from the penalty imposed by law for the felonious act. In this state the supreme court adopted from *Hamilton Ridge Lumber Sales Corporation v. Wilson,* 25 Fed. (2d) 592, the following principles:

"Although a corporation is considered a legal person in law, distinct from its stockholders, and is so recognized when there is no reason against it, yet it is just as well settled that this general doctrine should be disregarded, and the acts of the persons examined who constitute the corporation. A corporation has no thought or will of its own, and its every act is the act of the individuals who are running it, and where fraud is committed by the corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacity." *Ashby v. Peters,* 128 Neb. 338, 258 N. W. 639.

The evidence shows that defendant assumed personal responsibility for the transactions through which Kaderli lost his building and loan stock and the proceeds thereof in money; that defendant engaged agents and attorneys to solicit terms of settlement for the loss and was advised by them to discharge his civil obligation therefor; that de-

fendant gave Kaderli a personal note in settlement and never paid it; that a check was issued for the same purpose and payment thereof stopped; that defendant agreed in writing on terms of restitution and failed to comply with them. It is familiar law that, where a principal entrusts property to his agent for a particular purpose and the agent fraudulently converts the property to his own use without the assent of the owner, a subsequent purpose, an offer or agreement of the agent to make restitution does not defeat a prosecution by the state for embezzlement.

Throughout a long trial defendant had the vigilant services of eminent counsel. The rulings of the trial court indicate judicial fairness and impartiality. Every assignment of error has been considered in connection with all the evidence without finding an error prejudicial to defendant. It was the province of the jury to determine the issue of guilt. There being no substantial ground for interference with the verdict, the judgment below is

AFFIRMED.

SIMMONS, C. J., took no part in the decision of this case.

ARTHUR L. MILLER, APPELLANT, V. BANNER COUNTY, APPELLEE.

283 N. W. 206

FILED JANUARY 4, 1939. NO. 30440.

1. **Paupers.** The county board of each county are overseers of the poor and are vested with entire and exclusive superintendence of the poor in such county, with authority to employ a county physician.
2. ———. Any person becoming chargeable as a poor person in this state shall be chargeable as such poor person in the county in which he or she has established a legal settlement.
3. ———: SERVICES OF PHYSICIAN: LIABILITY OF COUNTY. A physician, not hired by the county, may not recover from the county for services rendered to a poor person in an emergency, where there exists a duly appointed county physician to care for the poor, the latter physician being equally available, able, willing, and ready to serve but not consulted.

4. ———: ———: ———. Where the physician rendering services to a poor person is ignorant of the fact that the county board of the county in which such services are rendered and in which such poor person has established a legal settlement has employed a county physician, that fact is not an aid to recovery. The former is chargeable with notice of such appointment.

APPEAL from the district court for Banner county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Rodman & Kuns, for appellant.

Glebe & Elliott and *William H. Heiss, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This action was brought against the county of Banner, defendant, by plaintiff, Arthur L. Miller, while a duly licensed physician, for professional services personally performed for, and also for necessary hospital care rendered to, O. R. Roberts, a poor person or pauper, in Kimball county, Nebraska, on and subsequent to June 7, 1935. There was a trial to the district court for Banner county, a jury being waived, resulting in a finding and judgment for the defendant. From the order of the trial court overruling his motion for a new trial, the plaintiff appeals.

It will be remembered that Banner and Kimball counties are adjacent and contiguous.

The case was tried upon a stipulation of facts, preserved in the bill of exceptions. It appears from such stipulation, viz.:

That on June 7, 1935, one O. R. Roberts, then employed as a farm laborer by one Leonard Johnson on a farm situated in the southern part of Banner county, suffered a hemmorrhage in the brain, causing paralysis, which rendered him temporarily unconscious; that Roberts was then and there in need of immediate medical attention; that his employer, Leonard Johnson, knowing that Roberts claimed to have a legal settlement in Kimball county, without noti-

fying the county physician or any of the county board, or any other official of Banner county, Nebraska, immediately conveyed Roberts to the Kimball hospital, in Kimball county, Nebraska, of which plaintiff was the sole proprietor, and placed him in charge of plaintiff doctor; that during the two weeks following June 7, 1935, it would have been extremely dangerous to the life of Roberts to have removed him from the Kimball hospital, as he was delirious and maniacal at times, and it was necessary to forcibly restrain him and to administer opiates; that the services performed by plaintiff were, as follows:

(Commencing) June 7, 1935.

Hospital, 21 days, at $5.00 a day	$105.00
Medications and medicines	10.00
Special nurse's care	15.00
Dr. Miller's fee: 1 call a day, $3 a call	63.00
Total	$193.00

That the charges made were reasonable; that during all this time Kimball county, Nebraska, had a duly appointed, qualified, and acting county physician, who then resided in the city of Kimball, in that county, and in such county the Kimball hospital, in which Roberts was treated, is situated; that plaintiff, prior to or during the period of treatment of Roberts, "did not get in touch with said county physician of Kimball county, nor with any other officials of Kimball county," nor did he attempt "to arrange for the care and hospitalization of said O. R. Roberts" with the officials of that county, and that plaintiff was not on June 7, 1935, or at any time subsequent thereto, the county physician of Kimball county, Nebraska.

It is further stipulated, "That on June 7, 1935, and for something over 21 years prior thereto, said O. R. Roberts had a legal settlement in Kimball county, Nebraska, and was a resident and inhabitant of Kimball county, Nebraska; that from the year 1914 to the year 1922, said O. R. Roberts farmed in said Kimball county; that thereafter said O. R. Roberts moved to Kimball, in said Kimball county, and has at all times resided there since that time."

The stipulation further discloses that, although Roberts worked as an employee on various farms in Banner county for a number of years immediately preceding June 7, 1935, he maintained a legal residence in the city of Kimball from the year 1928 to June 7, 1935, and that he voted there at various elections including the general election immediately preceding that date.

It is further shown by the stipulation that there were ample sources of information at hand from which the truth as to the settlement of Roberts could have been ascertained upon inquiry. Such sources plaintiff must have wholly failed to employ, or take any advantage of whatever. It would seem that the slightest investigation would have disclosed the situation.

Under the facts enumerated, it is clear that the disposition made of this case by the district court was, in all respects, correct. The county board of each county are overseers of the poor and are vested with entire and exclusive superintendence of the poor in such county, with authority to employ a county physician. Comp. St. 1929, sec. 68-104.

"Any person becoming chargeable as a poor person in this state, shall be chargeable as such poor person in the county in which he or she has established a legal settlement as hereinafter defined." Comp. St. Supp. 1937, sec. 68-111.

"The term 'legal settlement,' mentioned in this chapter, shall be taken and considered to mean as follows: Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a legal settlement therein." Comp. St. Supp. 1937, sec. 68-115.

The proper application of section 68-112, Comp. St. Supp. 1937, under the facts of this case, requires us to construe the words, viz., "If any person shall become chargeable in any county in which he or she has not established a legal settlement *at the time of applying for aid* he or she shall be duly taken care of by the proper authority of the county where he or she may be found" (Italics supplied), to the effect that the first application for aid was made in Kimball

county, and not in Banner county; that Kimball county was the county of the poor person's settlement, and relief must be administered on this basis. Kimball county had employed a county physician, who, under the facts stipulated, must be deemed competent. There is nothing in the stipulation from which it might be inferred that this county physician was not at all times ready, willing, and able to serve; but it is clear that he was not consulted, and no attempt to advise with or secure his services is shown. Manifestly the delivery of the sick man to the county physician would involve no additional risk or exposure when compared to a delivery of the same man to the Kimball hospital.

The case before us clearly falls within the rule frequently announced by this tribunal, viz.: "A physician, not hired by the county, may not recover from the county for services rendered to a poor person in an emergency where there exists a duly appointed county physician to care for the poor, the latter physician being able, willing, and ready to serve but not consulted." *Sayre v. Madison County,* 127 Neb. 200, 254 N. W. 874. See, also, *Newark Township v. Kearney County,* 99 Neb. 142, 155 N. W. 797; *Hamilton County v. Meyers,* 23 Neb. 718, 37 N. W. 623; *Burnham v. Lincoln County,* 128 Neb. 47, 257 N. W. 491.

It must be conceded that Roberts' legal settlement in Kimball county continuing uninterrupted for more than a score of years constituted that county the county of ultimate liability for his maintenance and care. In turn, Kimball county had provided its own exclusive agency to discharge that duty by the regular appointment of its county physician. In so doing it strictly limited its liability for medical services furnished to its poor within its boundaries to this agency so created. Ignorance of plaintiff (if such there was) of the fact that the county board of Kimball county had regularly employed a county physician, and thus provided for the exclusive medical treatment of the poor having a legal settlement therein, will avail him nothing. The rule appears to be that, where the physician rendering services is ignorant of the fact that the county board has employed

another physician, that situation is not an aid to recovery. The former is chargeable with notice of such fact. *Robbins v. Board of Commissioners*, 91 Ind. 537; *Woodruff v. Board of Commissioners*, 10 Ind. App. 179, 37 N. E. 732. This conclusion also necessarily follows from the fact that, by legislative enactment, the board of county commissioners are "vested with the entire and exclusive superintendence of the poor."

The judgment of the district court is, in all respects, correct, and is

AFFIRMED.

HARRY E. BOWMAN, RECEIVER, ET AL., APPELLEES, V. FRANK CALDWELL, APPELLANT.
283 N. W. 194

FILED JANUARY 4, 1939. No. 30455.

1. **Mortgages: FORECLOSURE: SALE: NOTICE.** When a notice of foreclosure sale stated that the sale would be held at the "east front door" of the courthouse, *held* that, where the officer conducted the sale inside the east front door, and at the top of a short flight of stairs leading from said door, there was a substantial compliance with the notice, and the sale was valid.
2. ———: ———: STAY: ESTOPPEL. Where defendants, in a suit to foreclose a mortgage, avail themselves of the statutory stay of execution, they are estopped from attacking such judgment in any manner.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Stiner, Boslaugh & Stiner, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

This is an action for the foreclosure of a real estate mortgage. Defendant appeals from the order of the trial court overruling the objections and confirming the sale.

The record discloses that a petition to foreclose 80 acres of land in Adams county was filed January 27, 1936, alleging default in payment of a mortgage note for $2,500 and interest.

On May 18, 1936, defendant filed motion to make the petition more specific and certain, and thereafter filed demurrer. On October 5, 1936, a decree of foreclosure was entered, in which appears this final paragraph:

"That upon stipulation of the plaintiffs, by their attorneys Stiner & Boslaugh of Hastings, Nebraska, and the defendant Frank Caldwell by his attorney F. L. Carrico of Hastings, Nebraska, made in open court;

"It is by the court ordered that a stay should be and is hereby granted herein to September 15, 1937, and that no order of sale shall issue herein until that date."

On October 13, 1937, an order of sale was issued and return duly made thereto, showing that the property sold for $3,000, the amount of the first and second liens being $3,192.13, the deficiency being $248.59.

On January 17, 1938, the defendant filed objections to the confirmation of sale. Among the six grounds was one setting out that there was no proper proof of the indebtedness, and another that the sale did not take place at the time and place advertised. The notice of the sale recited that the sale would be held "at the east front door" of the courthouse. All of the evidence of the witnesses in the bill of exceptions relates to this objection. Carroll Parker, the deputy sheriff, who conducted the sale, testified that he held this sale just where he conducts all of such sales.

It appears that, upon going in the said "east front door," steps immediately lead up to the level of the main hall, from which level doors open into the various offices. The evidence discloses that the deputy sheriff stood at the head of the stairs a part of the time, and a part of the time on the lower steps, all being inside the "east front door," and Mr. Boslaugh testified it was within 10 or 12 feet of the "east front door," while Mr. Carrico testified that the officer was as far as 30 feet from said door. The question arises,

if the officer stood up in the main hall, 30 feet from the door, at the time he conducted the sale, was it void?

In a note in 75 Am. Dec. 710, we find many interesting cases cited, and among them one setting out that a judicial sale in New York City was advertised to take place December 30, 1854, "at the city hall." By common usage all such sales were held in the rotunda of the city hall proper. Were it not for this usage, a notice of sale "at the city hall" would be too indefinite, as all the buildings within the park used for holding courts are by law deemed to be parts of the city hall. Description held not too vague. *Hornby v. Cramer,* 12 How. Pr. (N. Y.) 490.

A sale was held good when made within full view of the site of a courthouse which had burned down after a proclamation had been made at the exact site. 16 R. C. L. 47, sec. 33.

A case closely in point is that of *Trumbull v. Jefferson County,* 62 Wash. 503, 114 Pac. 186, in which it is said that the statute requires that land must be sold for taxes "at the front door of the courthouse." The sale was made from a stair landing 25 or 30 feet within the courthouse door, and any person near such door, or upon the street in front thereof, could see and hear what was going on. It was held that such sale was regular.

In a case released June 15, 1938, *Polson Logging Co. v. Martin,* 80 Pac. (2d) (Wash.) 767, it was held that sale of land was not invalid because conducted inside the courthouse doors rather than in front, as required by statute, where it was announced outside that the sale would be held inside because of the stormy weather. See, also, *Cherryhomes v. Board of Commissioners,* 160 Okla. 159, 16 Pac. (2d) 257.

In the case at bar, we find that there was a substantial compliance with the order of sale. The officer conducting the sale could be heard and seen by any one standing at the "east front door" of the Adams county courthouse. Furthermore, no showing is made of prejudice to the defendant.

The defendant also attacks the validity of the confirma-

tion on the ground that an extension agreement of the loan was not acknowledged. In the decree of foreclosure there was a finding that this extension agreement was duly executed, delivered, and signed.

This court has consistently held that, where defendants are personally served, they must set up all the defenses available, and if they avail themselves of the statutory stay of execution, they are estopped from attacking such judgment in any way. *Gilbert v. Provident Life & Trust Co.*, 1 Neb. (Unof.) 282, 95 N. W. 488; *Lackey v. Yekel*, 113 Neb. 382, 203 N. W. 542.

Finding no prejudicial error in the record, the decree entered by the district court is hereby

AFFIRMED.

CLARA M. OLSON, APPELLEE, V. FRANK CALDWELL, APPELLANT.
283 N. W. 195

FILED JANUARY 4, 1939. No. 30456.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Stiner, Boslaugh & Stiner, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

In this action for the foreclosure of a real estate mortgage, defendant appeals from the order of the trial court overruling the objections and confirming the sale.

A petition for a foreclosure in the usual form was filed, setting out that a default had occurred in the payment of the principal note of $2,000 and two interest coupons. A decree of foreclosure was entered October 6, 1936, which included a stipulation for a stay until September 15, 1937.

An order of sale was duly issued, and the return to the order of sale set out that the property had been sold for $2,600. Thereafter objections to the confirmation of sale were filed by defendant. These objections were in the same form as the objections in the companion case of *Bowman v. Caldwell, ante,* p. 554, 283 N. W. 194. As they are discussed at length in that opinion, it will not be necessary to discuss them here, and for the reasons therein set out, the record showing no prejudicial error, the decree is

AFFIRMED.

HEDWIG EFFENBERGER ET AL., APPELLEES, V. FRED P. MARCONNIT, APPELLANT: NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

283 N. W. 223

FILED JANUARY 4, 1939. No. 30433.

1. **Automobiles:** ORDERS OF RAILWAY COMMISSION: REVIEW. "On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." *Publix Cars, Inc., v. Yellow Cab & Baggage Co.,* 130 Neb. 401, 265 N. W. 234.
2. ———: PUBLIC CONVEYANCES: REGULATION. A certificate of convenience and necessity issued by the railway commission is in the nature of a permit or license, personal in its nature, and is not property in any legal or constitutional sense.
3. ———: ———: ———. The requirement of a certificate of convenience and necessity, before one may operate a bus line, is purely a regulatory measure and the railway commission has the sole power to grant, amend, deny, revoke or transfer such a certificate.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

John J. Ledwith and *Ginsburg & Ginsburg,* for appellant.

Arthur C. Pancoast, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

CARTER, J.

This is an appeal from an order of the railway commission of this state finding that the respondent, Fred P. Marconnit, had no right to operate a bus line under a certificate of convenience and necessity issued on May 12, 1936, and further finding that complainants Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg were the holders of such certificate and ordering that the respondent cease and desist from operating the bus line.

The record discloses that on January 4, 1936, the Safety Motor Lines made application to the railway commission for a certificate of convenience and necessity to operate a bus line between Fort Crook, Nebraska, and Twenty-fourth and N streets in the city of Omaha. On January 21, 1936, the railway commission entered its opinion and order, finding that the Safety Motor Lines was a copartnership consisting of Fred P. Marconnit, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr., and granting the certificate of convenience and necessity subject to certain conditions. On May 12, 1936, the railway commission found that all the conditions imposed by its previous order had been complied with by the Safety Motor Lines, that the copartnership then consisted of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg, and ordered that the Safety Motor Lines might continue operating the bus line.

On September 18, 1936, Marie Schoenberg commenced a suit in the district court for Douglas county against the respondent, in which she alleged that the Safety Motor Lines was a copartnership composed of herself, Hedwig Effenberger and Bernard Effenberger and asking that the respondent, Fred P. Marconnit, be restrained from interfering with the Safety Motor Lines in any way. Hedwig Effenberger and Bernard Effenberger filed petitions in intervention joining in the petition of Marie Schoenberg. Respondent, in his answer, contended that he was at all

times the owner of Safety Motor Lines and that complainants had merely lent the use of their names to him. On April 23, 1937, the court found for the respondent and against the complainants, finding specifically that respondent was the owner of Safety Motor Lines, "together with its equipment, rights and privileges." From this decree no appeal was taken.

On June 11, 1937, the complainants herein filed their complaint with the railway commission, alleging that respondent was unlawfully operating a bus line without a certificate of convenience and necessity. On August 27, 1937, the railway commission, after a hearing, entered an order so holding, but finding further that an order to cease and desist could not be enforced without supplemental proceedings in the district court, and dismissed the complaint.

On January 25, 1938, complainants filed a motion for a modification of the order of August 27, 1937. The railway commission, on February 5, 1938, after another hearing, found that respondent had no right to operate the Safety Motor Lines and ordered him to cease and desist. The order also found that complainants were entitled to the rights and privileges conferred by the certificate of convenience and necessity issued to the Safety Motor Lines. From this order the respondent appeals.

It is not contended that the railway commission does not have the power to require a certificate of convenience and necessity before one may engage in the operation of a bus line between fixed termini. This court has held that the grant or denial of a certificate of convenience and necessity by the railway commission is the exercise of an administrative or legislative power. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234. In that case we also said: "An appeal to this court from such an order involves only the questions whether the railway commission acted within the scope of its authority and whether its order is supported by evidence showing that the order is not unreasonable or arbitrary. Where the action of the railway commission is not unreasonable or arbi-

trary and does not exceed its powers, this court will not interfere with its findings of fact, because they involve an administrative rather than a judicial question."

The question of primary interest in this case is whether the decree of the district court for Douglas county, adjudging that the property used by Safety Motor Lines, "together with its equipment, rights and privileges," was owned by the respondent, is a judicial determination that is binding upon the railway commission. It is apparent that the district court for Douglas county, by its decree, attempted to assign the certificate of convenience and necessity issued by the railway commission on January 21, 1936, as amended on May 12, 1936, and that it is upon this assignment that respondent must rely. A proper determination of this question requires an understanding of the nature of a certificate of convenience and necessity.

In *Pennsylvania R. Co. v. Public Utilities Commission*, 116 Ohio St. 80, 155 N. E. 694, the court, in discussing the nature of a certificate of convenience and necessity, said: "This court has repeatedly declared that a certificate of convenience and necessity, issued by the Public Utilities Commission to a motor transportation company, is not a franchise, and that the holder of such certificate does not thereby acquire a property right in the route covered by such certificate; that the issuing of such certificate is authorized only for the purpose of promoting the public convenience and necessity, and not for the purpose of conferring upon the holder of such certificate any proprietary interest or franchise in the public highways; that the purpose in limiting the number of certificates that may be granted over the same route is to promote the public convenience and necessity by restricting the number of busses to the needs of the public, and thus occasion as little inconvenience as possible to the public using the highway in the usual and ordinary way, and to insure to the holder of the certificate such immunity from competition as will enable him to serve the public convenience and necessity by regular and continuous public service; that a certificate of con-

venience and necessity is in the nature of a revocable personal permit, and has not the attributes of a property right." See, also, *Westhoven v. Public Utilities Commission,* 112 Ohio St. 411, 147 N. E. 759; *Scheible v. Hogan,* 113 Ohio St. 83, 148 N. E. 581; *Blackmore v. Public Utilities Commission,* 117 Ohio St. 554, 160 N. E. 27.

The distinction between a franchise and a certificate of convenience and necessity is aptly made in *Re St. Johns River Line Co.* (1935) 7 P. U. R. n. s. 268, as follows: "A certificate of public convenience and necessity, however, is distinctly different from the grant of a franchise to use and occupy streets. The franchise to use and occupy streets is a grant of a limited property right for the use of public streets, while a certificate of public convenience and necessity is strictly a regulatory measure, and the granting or withholding of a certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public."

In the early case of *Martin v. State,* 23 Neb. 371, 36 N. W. 554, this court had occasion to discuss the effect of a license as distinguished from a franchise in the following language:

"In support of this contention, it is insisted that the license is a franchise, or public right, vested in the individual, and for which he has paid a consideration, and therefore it has all the necessary elements of property under the provisions of the Constitution that, 'No person shall be deprived of life, liberty, or property, without due process of law.' * * * There is no *vested* right in a license to sell intoxicating liquors, which the state may not take away at pleasure. *Pleuler v. State,* 11 Neb. 575. Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. *Board of Excise v. Barrie,* 34 N. Y. 657. They are subject to the direction of the government, which may revoke them as it deems fit,

and may be abrogated by the adoption of a municipal ordinance prohibiting the sale of liquors. *Columbus v. Cutcomp,* 17 N. W. (Ia.) 47.

"The laws of 1881 (Comp. St., ch. 50), commonly known as the Slocumb law, absolutely prohibits the entire traffic in intoxicating liquors 'by the most expressive language,' giving only an exception where the license or permit is issued. *Pleuler v. State, supra,* 576. We therefore conclude that there is no such vested right or essential element of property in a license as to bring it within the provision of the Constitution above quoted."

We necessarily conclude that a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. It is a mere license that can be amended or revoked by the power authorized to issue it. Such being the case, it is personal in its character, is not transferable, and does not pass by succession. It is purely a regulatory measure that can vest no property right in the holder. This being true, the railway commission has the sole power to grant, amend, deny, revoke or transfer a certificate of convenience and necessity. An attempt on the part of the district court to so do is without legal sanction.

The record shows that the certificate of convenience and necessity was first issued to Safety Motor Lines, which was a copartnership composed of respondent, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr. Subsequently, by an order of the commission, the certificate was continued in the name of Safety Motor Lines, a copartnership consisting of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg. From that time on, respondent did not have a certificate of convenience and necessity and the railway commission properly so held. Until such time as the respondent obtains a certificate of convenience and necessity to operate a bus line, he cannot lawfully so do. The order of the railway commission ordering the respondent to cease and desist from operating a bus line in the instant case was not arbitrarily made. It

was the only order that could properly be entered on the evidence adduced.

AFFIRMED.

FRED P. MARCONNIT, APPELLEE, V. BERNARD EFFENBERGER ET AL., APPELLANTS.
283 N. W. 226

FILED JANUARY 4, 1939. NO. 30493.

1. Carriers: REGULATION. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in the transportation of passengers within the state. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201.
2. Automobiles: PUBLIC CONVEYANCES: REGULATION. The railway commission has the sole power to grant, deny, amend, transfer or revoke a certificate of convenience and necessity for the operation of a bus line. *Effenberger v. Marconnit, ante*, p. 558, 283 N. W. 223.
3. ———: ———: ———. The powers of the district courts of this state over certificates of convenience and necessity issued by the railway commission are limited to the enforcement of the orders of the commission as provided by section 75-509, Comp. St. 1929.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Reversed and dismissed.*

Arthur C. Pancoast, for appellants.

John J. Ledwith, Herman Ginsburg, B. S. Baker and *Edward Shafton, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is a suit for an injunction in which the plaintiff, Fred P. Marconnit, asks that the defendants be enjoined from interfering in any manner with the operation of plaintiff's bus line and that said defendants also be enjoined from operating a competing bus line under a certificate of

convenience and necessity issued by the railway commission of this state, which plaintiff claims belongs to him exclusively. The trial court granted an injunction and defendants appeal.

The record discloses that on January 21, 1936, the railway commission granted a certificate of convenience and necessity to the Safety Motor Lines, a copartnership consisting of plaintiff, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr., subject to certain conditions, for the operation of a bus line between Fort Crook, Nebraska, and Twenty-fourth and N streets in the city of Omaha. On May 12, 1936, the railway commission found that all conditions imposed had been complied with and ordered that the certificate of convenience and necessity should continue in the name of the Safety Motor Lines, a copartnership at that time consisting of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg. On September 18, 1936, Marie Schoenberg commenced a suit against the plaintiff herein, in which Hedwig Effenberger and Bernard Effenberger joined as interveners, in which suit Marie Schoenberg and the interveners claimed to be the sole owners of Safety Motor Lines and asked that Fred P. Marconnit be enjoined from interfering with their ownership thereof. In his answer, Fred P. Marconnit claimed to be the owner and alleged that the plaintiff and interveners had loaned the use of their names to him and that he was at all times the sole owner of Safety Motor Lines. A trial was had resulting in a decree finding that defendant therein, Fred P. Marconnit, was the sole owner of Safety Motor Lines, "together with its equipment, rights and privileges." From this decree no appeal was taken.

On February 5, 1938, after a hearing based upon a complaint supported by evidence, the railway commission found that plaintiff herein, Fred P. Marconnit, had no right to operate the Safety Motor Lines for the reason that he had no certificate of convenience and necessity and ordered him to cease and desist operation thereof. This order was appealed from and affirmed by this court in the companion

case of *Effenberger v. Marconnit, ante,* p. 558, 283 N. W. 223.

This suit was commenced on January 6, 1938, by plaintiff, Fred P. Marconnit, praying that the defendants, Hedwig Effenberger and Bernard Effenberger, be restrained from interfering with plaintiff's business and from operating a bus line under the rights and privileges which have been granted to plaintiff by virtue of the certificate of convenience and necessity which he purports to own. Service of process was not had upon Marie Schoenberg and she was not, therefore, a party to the suit. The trial court perpetually enjoined the defendants from operating any motor transportation or bus line under the certificate of convenience and necessity involved herein and also enjoined the defendants from interfering with plaintiff's business and operations under said certificate of convenience and necessity. The correctness of this decree is before the court on this appeal. A more extensive statement of the facts may be found in *Effenberger v. Marconnit, supra.*

The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in the transportation of passengers within the state. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201. We have heretofore held that the requirement of a certificate of convenience and necessity by the railway commission is not an unreasonable regulation, and that the grant or denial of such a certificate requires the exercise of administrative and legislative powers. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.,* 130 Neb. 401, 265 N. W. 234. We also have held that a certificate of convenience and necessity to operate a bus line is in the nature of a permit or license, personal in its nature, and is not property in any legal or constitutional sense. The same case also holds that the requirement of a certificate of convenience and necessity is purely a regulatory measure and the railway commission has the sole power to grant, deny, amend, transfer or revoke such a certificate. *Effenberger v. Marconnit, supra.*

We also hold that the judgment of the district court de-

creeing that Fred P. Marconnit was the owner of the Safety Motor Lines and the property used by it is a final determination of that question, no appeal having been taken therefrom. The trial court was without the power, however, to assign or transfer the certificate of convenience and necessity from the copartnership of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg, doing business as the Safety Motor Lines, or its subsequent trade-name of Fort Crook-Bellevue Boulevard Line, to Fred P. Marconnit. This was a function committed by law to the railway commission. The power of the court in such matters is limited to the enforcement of the orders of the railway commission as provided in section 75-509, Comp. St. 1929.

The power of the courts over the administrative and legislative orders of a public utilities commission, such as the railway commission of this state, is ably discussed in *State v. Public Service Commission,* 324 Mo. 270, 23 S. W. (2d) 115, wherein the court said:

"The power to grant, or to refuse to grant, to a public utility a certificate of convenience and necessity is committed to the discretion of the Public Service Commission, within defined limits, and not to the circuit court or to this court. Respondent seeks to justify the judgment of the circuit court reversing the commission's order and remanding the cause with instructions to grant the certificate applied for, on the ground that the action of the commission in making its finding and order was quasi-judicial, and that being true a court of equity upon review was bound to affirm the order, set it aside, modify it, or to make one of its own, according to what it deemed right and equitable under the facts found by it. It would be a work of supererogation at this late day to enter upon an analysis of governmental powers in order to point out the line of demarcation between those with which the Public Service Commission is invested by statute and those exercised by the courts. The constitutionality of the Public Service Commission Law has been considered by this court from every angle in that regard, and the chart it furnishes may now safely be followed.

"It is true that all orders of the commission are subject to judicial review, and that suits brought for such review must be 'tried and determined as suits in equity.' But after the chancellor has made his own finding of the facts the only application he can make of them is to determine from them whether the order under review is reasonable and lawful. If he finds it both reasonable and lawful, it is his duty to affirm it; if he finds it either unreasonable or unlawful, he must set it aside. He cannot modify it or entirely displace it with one of his own, as was done by the circuit court in this case. * * * When an order is set aside the court may remand the cause to the commission for such further action *as it may desire to take;* the court oversteps the boundaries of its jurisdiction when it attempts to tell the commission what the action should be. There seems to be one exception to this: When the commission has excluded evidence that it should have received, the cause may be remanded with directions that it hear such evidence and then make a new order."

The record clearly shows that the certificate of convenience and necessity involved in this suit is in the name of a copartnership consisting of Marie Schoenberg, Hedwig Effenberger and Bernard Effenberger. The district court does not have the power to transfer it to any one else, that power being exclusively lodged in the railway commission. The copartnership named, therefore, has a certificate of convenience and necessity to operate a bus line from Fort Crook, Nebraska, to Twenty-fourth and N streets in Omaha. The contention is made that it owns no busses or other property required by the commission to entitle it to operate. This may be true, and possibly, if complaint is made, the railway commission may come to a like conclusion, for aught we know, but this can avail the plaintiff nothing. Until such action be taken by the railway commission, the defendants clearly have the necessary authority to operate their line.

We necessarily conclude that the order of the trial court enjoining the defendants from in any manner operating

or attempting to operate any motor transportation or bus line or service, under the certificate of convenience and necessity involved in this suit, is erroneous. For the reasons herein stated, the decree of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GEORGE E. CARLSON, APPELLEE, V. OLGA H. CARLSON, APPELLANT.
283 N. W. 214

FILED JANUARY 4, 1939. NO. 30454.

1. Divorce: CUSTODY OF CHILDREN. "In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child." *Feather v. Feather*, 112 Neb. 315, 199 N. W. 533.
2. ———. Evidence examined, and *held* that the welfare and best interests of the minor child require that her custody be committed to the mother under the strict supervision of the court.

APPEAL from the district court for Clay county: FRANK J. MUNDAY, JUDGE. *Affirmed as modified.*

Ledwith & Ledwith and *August C. Krebs,* for appellant.

D. B. Massie, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

Plaintiff sued for a divorce, alleging extreme cruelty; further that two children were born as the result of the marriage—Norma, born November 12, 1933, and Walter, born February 18, 1937; and prayed for an absolute divorce, the care, custody and control of both minor children. The defendant answered, denying extreme cruelty to the plaintiff, and for her cross-petition alleged that she had been residing with her parents in Lincoln, Nebraska, since May 6, 1937, and that the two children of the marriage, since their respective births, have been in the custody and

control of the cross-petitioner; further alleged extreme cruelty on plaintiff's part towards her; and prayed that plaintiff's petition be dismissed, that she be awarded an absolute divorce, the care, custody and control of both minor children, and support money for herself and the minor children, and prayed for equitable relief.

April 5, 1938, the court entered its decree, finding that the plaintiff should be granted a divorce from the defendant, and awarded to the plaintiff the custody of the daughter Norma during the school year, and for the remaining three months of each year to the mother; further that the plaintiff was entitled to the child Norma, commencing April 8, 1938, and retaining custody of her until June 1, 1939, at which time the mother should have the custody of the child until September 1, 1939. The custody of the infant Walter was awarded to the defendant. The decree further provided for the payment of $10 a month for the support of the child Walter, and $10 a month for three months of the year that the daughter Norma would be in the custody of her mother; provided for property settlement and attorneys' fees. The defendant, cross-petitioner, appeals from the judgment and decree.

The evidence discloses that the parties were married April 14, 1931; that the plaintiff lives on a farm two miles west of Sutton, in Clay county, Nebraska, and by a previous marriage has a boy 13 years of age. The wife left the home May 6, 1937. Both the plaintiff and the defendant are persons bearing good reputations and are highly respected by their neighbors as hard-working, home-making and intelligent people. The only difficulty between the two is the deep-seated belief of each in their own faith or religion, which caused many controversies, disagreements and misunderstandings during the course of their married life; more particularly with reference to the children and the baptism of them. The plaintiff insisted that they be baptized by an ordained minister, denoting his belief and respect for the clergy. The infant Walter was so baptized. The defendant desired to have the children baptized by a

deacon of the church to which she belongs, where baptism by a minister is not necessary. Norma was so baptized, which displeased the plaintiff. The parties being adamant upon their religious beliefs and remaining constant in their position that true religion demanded certain ceremonial rites carried out in a prescribed way and by persons peculiarly qualified led to the court's decree.

This case presents a very unusual situation, and the record discloses an earnest effort on the part of counsel for both parties in an endeavor, by their examination of the principals involved, and subsequently by the court in arriving at a decision, to perfect a reconciliation. To cover the details of the disagreements as to the religious faith of the parties herein and their apparent inability to agree for the best interests of the children would unnecessarily lengthen this opinion. The defendant insisted on bringing up the children in her own faith, and apparently in one church where she would have to travel a distance, as shown by the record, of 90 to 100 miles when taking the children to church. The record is void of the existence of a church, of like or similar nature, in the vicinity of the residence of defendant's parents where she now lives, and apparently the church of her choice is the only one that she considers.

The differences between the husband and wife, concisely stated, is in the defendant's testimony, a part of which is quoted: "Q. You loved your faith and he loved his? A. Yes, sir. Q. And the babies suffered—is that it? A. Yes, sir. Q. You both pretended to be christians? A. Yes. Q. Do you think there is a possibility of you and your husband returning to the home, which was created for the purpose of these two children? A. No. Q. And being big enough and intelligent and christian enough to suppress your own feelings and emotions? A. No. Q. You don't think that could be done? A. No. * * * Q. And after the children have grown a little older, they may follow any creed that they select or desire? A. If they are old enough for themselves, when they become of age, they can take what they want."

The court made the following finding in the decree: "That both parties are responsible, competent and able physically and morally and in other ways to have the custody of the children." The principal issue before us is the decree of the district court in awarding the custody of the daughter Norma to the plaintiff during the school year, and to the defendant for three months constituting the summer vacation period of the year.

In the case of *Feather v. Feather,* 112 Neb. 315, 199 N. W. 533, this court held: "In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child." This is the very question with which we are concerned.

In *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771, it was held: "In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse."

In the instant case, the court found both plaintiff and defendant responsible and competent, physically and morally, to have the custody of the children which was awarded to them. The record discloses the truth of such finding. Both the husband and wife are people of high moral character, hard-working, intelligent and respected. The plaintiff is a farmer and has been employed on the soil conservation committee for a period of four years. By such employment he is at times away from home and would be unable to devote sufficient time to the welfare of Norma. True, his aunt, a respected person, a nurse though not registered, who has raised four children, is keeping house for him; he has the necessary, proper and comfortable facilities for the welfare of the child, and is capable of supporting her. On the other hand, the mother, who is living with her parents, has the necessary facilities and a comfortable home in which to raise the child, and it must be generally conceded that the best interests and welfare of a child of

tender years will be best subserved by placing the child in the custody of the natural mother, especially so when she is a fit and proper person, and there is no allegation or proof to the contrary.

The trial court possibly had in mind that the mother had left the home first and was the wrong-doer, and in applying the principle of law, as announced in *Swolec v. Swolec, supra*: "Other considerations being equal, it is usual to award the custody of children to the innocent spouse."

In examining the record in this case, we recognize that it is seldom, if ever, that any other person can be found who can bestow upon a child of tender years such loving care and have its welfare so much at heart as its mother. The record does not disclose anything that would justify depriving this mother of the care and custody of her infant daughter.

The decree of the district court should be modified, as to place the care and custody of the child Norma in her mother, with the right of the plaintiff husband to visit the child at all reasonable and proper times and under proper conditions and circumstances, either at the mother's place of residence or at some place agreed upon by them, and that the plaintiff have the care, control and custody of the child Norma for and during the period of the summer vacation. It is also advisable in this case that the care and custody of the child be under the strict supervision of the court while in the mother's custody.

The decree should be further modified in awarding the mother an additional $10 a month during the period that the minor child Norma is with the mother; that is, during the school year. This amount of $10 a month is not to be paid during the period that she is with her father; that is, during the vacation period in the summer; all subject to further order of the court. For services rendered in this court by defendant's attorney a fee of $100 is allowed, to be paid by the plaintiff; plaintiff to pay the costs of this proceeding.

The decree of the court, in so far as the minor children are concerned, is never final in the sense that it cannot be changed. Section 42-312, Comp. St. 1929, provides: "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." For this reason and because of the peculiar circumstances of this case, we believe that the custody of the child Norma should be in the mother, as stated in this opinion, under the strict supervision of the court.

AFFIRMED AS MODIFIED.

MINNIE DOROTHY KENFIELD, APPELLANT, V. ADOLPH DUDEK, EXECUTOR, ET AL., APPELLEES.
283 N. W. 209

FILED JANUARY 6, 1939. No. 30444.

1. Wills: CONSTRUCTION. "In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104.
2. ———: CODICILS. "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will, so far as it is not altered or revoked by the codicil, * * * and the will and codicil are to be regarded as but one instrument, speaking from the date of the codicil." 68 C. J. 861.
3. ———: CONSTRUCTION. Provisions in a will for the benefit of the testator's widow should be construed liberally, and especially should receive a construction most favorable to her when made for her support, or accepted by her in lieu of her rights under the intestate laws.
4. ———: ———. "The provisions of a codicil may have the effect of removing an ambiguity which appears on the face of the will." 1 Jarman, Wills (7th ed.) p. 167.
5. ———: ———. Will and codicil construed as an entirety, and *held*, as to the existing residue of this estate, to clearly vest in defendant widow all rights specified in paragraph 3

thereof, as exclusive of, superior to, and wholly unaffected by, the provisions contained in said testamentary instruments in favor of plaintiff.

APPEAL from the district court for Colfax county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

N. H. Cornell, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a suit in equity for the construction of the will of George W. Wertz, and for other relief. The petitioner is Minnie Dorothy Kenfield, a sister of the deceased, and Lottie V. Wertz, the widow of deceased, may be said to be the defendant.

The record discloses that George W. Wertz died on May 29, 1934, leaving his last will and testament, which had been executed by him on July 26, 1929, and a codicil thereto bearing date of October 19, 1932. On August 23, 1934, these instruments were duly admitted to probate. Administration has been had in said estate, and the final account of the executors approved. Lottie V. Wertz, appointed by the terms of the will as a trustee, has given bond and qualified as such. The value of the remaining property belonging to this estate is approximately $3,500, and the annual income arising therefrom amounts to approximately $400 *per annum.*

The will of George W. Wertz, as executed by him on July 26, 1929, contains seven paragraphs. Of these, five paragraphs relate to the controversy here presented, viz., the first, second, third, fourth and seventh of the original will, as modified by the provisions of the codicil of October 19, 1932.

The first paragraph provided that "all my just debts, funeral expenses and expenses of administering my estate be first paid."

The applicable provisions of the second paragraph of the original will are: "It is my will that * * * she (plaintiff) shall be paid the sum of $25 per month during the term of her natural life while living with her husband Marion Kenfield; and if she shall live apart from him then she shall be paid the sum of $50 per month during the term of her natural life, such sums to be paid monthly in advance," etc.

The third paragraph of the original will reads as follows:

"I give, devise and bequeath to my wife, Lottie V. Wertz, all the remainder of my estate wheresoever situated and of whatsoever nature, with the exception of the redwood bookcases and cabinet hereinafter mentioned, for her exclusive use during the term of her natural life, she to have the joint management thereof, and the entire income therefrom. In case she shall need any part of the principal to employ necessary care and to keep her in comfortable circumstances, she may use such part thereof as may be necessary for such purposes. I desire that she may not be held to any critical accounting in this respect, but may use sound discretion as to what constitutes necessity or comfort."

The fourth paragraph of the will directs, that, "after the death of my wife," the Wertz estate shall be reduced to money, and such money "divided into three equal parts," and two parts paid over to the children of two brothers of the deceased, and one part to the children of Minnie Dorothy Kenfield. This paragraph also sets forth: "These bequests are all at all times to be subject to the payment of the monthly allowances aforesaid to my sister (Minnie Dorothy Kenfield) during the term of her natural life, and a sufficient part of my estate shall always be preserved to insure such payments, and not divided until the death of my sister."

The seventh paragraph of the original will governs the distribution of this estate, "after the death of my wife and after the death of my sister above mentioned," and pro-

vides that, "until the death of my sister, Minnie Dorothy Kenfield, each and all of my trustees herein named or hereafter named or appointed, shall preserve in their hands enough of said estate to insure the payment of the monthly allowance to my sister as above set forth, during the term of her natural life."

The codicil to this will, duly executed, bearing date of October 19, 1932, contained the following provisions:

"In view of changing conditions which have much depreciated the value of my property, and whereby I have lost a good deal of money during the past two years, I hereby make, publish and declare this to be a codicil to my last will and testament of date July 26, 1929, which will is now in the hands of Adolf Dudek, of Clarkson, Nebraska.

"1. My wife shall pay to my sister, Mrs. Dorothy Kenfield, the sum of $15 per month as long as she remains with and lives with her husband; and in the event of a divorce or permanent separation from her husband, my sister shall receive from my widow $25 per month.

"2. In the event that my interest in helium gas bearing lands in Stanton county or in Colfax county shall yield enough to pay my wife therefrom $25,000 or more, she shall pay to my sister per month as set forth in my said will dated July 26, 1929, from the date of such receipt of money, or more if she shall feel able to do so, this being at her discretion. This property should pay my wife or my estate at least $100,000; and in that event she will have no difficulty in making the payments as stated in said will. She shall then also buy a suitable home for my sister, and keep the taxes paid on the same and the same in repair during the life of my sister, and buy her suitable furniture for living purposes and to keep her in comfort, regardless of whether she is married or living with her husband. The money for these purposes shall be taken from the principal coming from such interest in helium or other gas in Stanton or Colfax counties, and after the death of my sister the property constituting such home shall be the property of my sister's children.

"3. In all other respects the said will of July 26, 1929, shall remain in full force and effect."

The basic question presented by the issues in this case is whether, under the terms of this will, the sister, Mrs. Kenfield, is entitled to have her claim preferred over the rights of Mrs. Lottie V. Wertz, the wife and widow, to support, as provided in the third paragraph of the last will of the decedent, in the $400 income and the $3,500 principal, the entire residue now remaining in the George W. Wertz estate. The district court resolved this question in favor of the defendant. Plaintiff appeals.

It will of course be conceded that, "Where the language in a will is clear and unambiguous, there is no room for construction, and it becomes the duty of the executor to carry into effect the plain provisions of such a will." *In re Estate of Nelson*, 132 Neb. 376, 272 N. W. 219.

However, the quoted language of the testamentary instruments here involved, in view of the surrounding circumstances, may not be said to be clear and unambiguous, and clearly to ascertain the intent of the testator, questions of its proper construction must be rightfully determined. For, "In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104. See, also, *In re Estate of Skinner*, 122 Neb. 438, 240 N. W. 549; *Seybert v. Seybert*, 118 Neb. 246, 224 N. W. 1; *In re Estate of Smith*, 117 Neb. 776, 223 N. W. 17; *Krause v. Krause*, 113 Neb. 22, 201 N. W. 670.

And, "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will, so far as it is not altered or revoked by the codicil, * * * and the will and codicil are to be regarded as but one instrument, speaking from the date of the codicil." 68 C. J. 861.

It may be noted that this is quite in harmony with provisions of the codicil as framed by the testator in the present case.

One of the real parties in interest here being the widow of the testator, the application of the following principle

is naturally invoked, viz.: "Provisions in a will for the benefit of the testator's widow should be construed liberally in her favor. It has been held that the fact that a testator owed his wife protection and support raises a presumption that he intended to make ample provision for her in his will, and an intention to leave his widow without means of support will be attributed to a testator only when clearly expressed." 69 C. J. 102.

This is particularly true where either expressly or by necessary implication the testamentary provisions for the widow are in lieu of statutory rights possessed by her which are beyond the power of the husband to limit and control. Thus, a provision in lieu of dower is to be construed most favorable to the widow. *Matter of Goetz,* 71 App. Div. 272, 75 N. Y. Supp. 750; *Matter of Gabler,* 140 Misc. Rep. 581, 251 N. Y. Supp. 211; *Matter of Smathers,* 133 Misc. Rep. 812, 234 N. Y. Supp. 99; *Tarter's Estate,* 291 Pa. St. 458, 140 Atl. 502. In the case last cited the supreme court of Pennsylvania announced that all doubts will be resolved in favor of a widow accepting provisions of a will in lieu of her rights under intestate laws.

In the authorities above cited, the New York courts hold that, where a gift is founded upon the exclusion of dower, such fact is also to be taken into consideration, and the provision thus made is to be regarded as the dominant provision, and all other clauses are to be made subordinate thereto, if the will as a whole can be supported. See, also, *Stimson v. Vroman,* 99 N. Y. 74, 1 N. E. 147; *Roseboom v. Roseboom,* 81 N. Y. 356.

But, in the instant case, it appears that the property owned by George W. Wertz consisted in part of personal property, and in large part of real estate having its situs within this state. It appears that neither George W. Wertz nor his wife were parents of living children. By sections 30-101 and 30-103, Comp. St. 1929, on the death of the testator, the widow, subject to the payment of his debts, etc., became entitled to one-half of the real estate in fee simple, and to an equal portion of the personal property

of which the testator died possessed. By sections 30-107 and 30-108, Comp. St. 1929, the widow possessed the right of election between her statutory rights and the provisions of the will. In effect, in the instant case, she surrendered, for the benefit of the estate, her statutory rights in consideration of the provisions of her husband's will made for her benefit. In so doing, as to such testamentary provisions, she was a purchaser for value. In this transaction the element of gratuity constitutes no part. So, the facts of the situation bring Mrs. Wertz squarely within the protection of the principles of construction already discussed herein, and entitle her to the most favorable construction of paragraph three of the will under consideration. But the defendant in this case is not only entitled to this favorable construction because of the actual contractual consideration which she furnished, but also because of the inherent nature of the provisions of paragraph three of this will. It evidences an exclusive purpose and intent on the part of the testator, and is wholly occupied in furnishing and providing an adequate support and maintenance for the testator's wife.

The unquestioned rule established by the authorities, is: "A provision in favor of the support of a wife should receive the most favorable construction." 69 C. J. 946. See, also, *McCallum's Estate,* 211 Pa. St. 205, 60 Atl. 903; *Pope v. Pope,* 209 Mass. 432, 95 N. E. 864; *Rhode Island Hospital Trust Co. v. Hail,* 47 R. I. 64, 129 Atl. 832; *Sherman v. Riley,* 43 R. I. 202, 110 Atl. 629; *Davis v. Davis,* 138 Va. 682, 123 S. E. 538; *Moore v. Alden,* 80 Me. 301, 14 Atl. 199; *Forepaugh's Estate,* 199 Pa. St. 484, 49 Atl. 236; *Merriam v. Merriam,* 80 Minn. 254, 83 N. W. 162.

The acceptance of these canons of construction is decisive in the disposition of this case. If the second paragraph of the original will may be deemed ambiguous because the origin or source of the legacy of $25 or $50 a month for the benefit of the plaintiff herein is not definitely indicated, the ambiguity is removed by the terms of the codicil. "The provisions of a codicil may have the effect

of removing an ambiguity which appears on the face of the will." 1 Jarman, Wills (7th ed.) p. 167. See, also, *In re Venn* (1904-1905) W. N. Part I, 94.

The effect of this is that the residuary legacy or devise created by the words of the will, viz., "all the remainder of my estate wheresoever situated and of whatsoever nature," manifestly included all property remaining after payment of testator's debts, funeral expenses and the costs of administration. The extent of the property and the nature of the gift created and vested in Lottie V. Wertz by paragraph three of this will was clear, definite, and certain, and wholly unlimited and unmodified. For this, she waived her statutory rights. In turn she received the residue of the property of the estate for her exclusive use during the term of her natural life. The actual and unqualified receipt of the physical properties of this estate by Mrs. Wertz is unquestioned.

"In the absence of a clear direction to the contrary in the will, .the beneficiaries have the same interest in the income, rents, and profits of the property given to them as they have in the property itself." 69 C. J. 284.

But, in addition to this presumption, the words of the will are that she shall have "the entire income therefrom," and "in case she shall need any part of the principal to employ necessary care and to keep her in comfortable circumstances, she may use such part thereof as may be necessary for such purposes." By the terms of the codicil, an intention is fairly expressed by the testator that the exclusive source of payment of the legacy provided for plaintiff should be the moneys derived from "helium or other gas in Stanton or Colfax counties." The provisions of the fourth and seventh paragraphs of the will upon which plaintiff relies appear to be qualified by the words "after the death of my wife," and construed with the will and codicil as entireties confer on plaintiff no present right of action. The sole and exclusive right to, and employment of, the income of the estate during the life of the widow is clearly vested in such widow. These rights are not to be

impaired by the other provisions of the testamentary instruments here involved. So long as the widow survive, the clear provisions of the testator's will in her behalf may not be deemed to be limited, modified, or qualified by the mere precatory language providing for the payment of certain amounts by defendant to plaintiff as set forth in paragraph two of the original will, as corrected and explained by the terms of the codicil thereto.

It follows that the clear terms of paragraph three of the original will fully vested in defendant widow all the rights therein defined and given, and which are exclusive of, superior to, and wholly unaffected by, the provisions of these testamentary instruments in behalf of plaintiff Kenfield. Therefore, the exclusive right to the enjoyment of all income arising from the estate of George W. Wertz, deceased, as well as all other rights and privileges, vested in the defendant Lottie V. Wertz by the terms of the third paragraph of the last will of deceased, wholly undiminished, unqualified, and unmodified by any of the provisions thereof in favor of plaintiff Kenfield, is in said Lottie V. Wertz duly confirmed.

The judgment of the district court is, therefore,

AFFIRMED.

VICTOR N. HANSEN, APPELLANT, V. DAKOTA COUNTY ET AL., APPELLANTS: GEORGE W. LEAMER, INTERVENER, APPELLEE.
283 N. W. 217

FILED JANUARY 6, 1939. No. 30451.

1. **Statutes:** CONSTRUCTION. "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed*, 3 Neb. 17.
2. ———: ———. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto.

3. ———: ———. When the legislative intent is left in doubt by failure to clearly express it in the act, resort may be had to the title as an aid to the discovery of such intent.
4. **Bridges.** Chapter 87, Laws 1935 (Comp. St. Supp. 1937, secs. 39-2101 to 39-2112), construed, and *held* that such act authorizes the purchase of interstate bridges by counties designated therein, by means and method stated in such act.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed.*

Clarence T. Spier, L. J. Te Poel, Kenneth S. Finlayson, Alexander McKie, Jr., and *Malcolm R. Smith*, for appellants.

George W. Leamer, W. V. Steuteville and *Joseph E. Marsh, contra.*

Fred H. Free, amicus curiæ.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action for a declaratory judgment to determine whether the county commissioners of Dakota county are authorized to purchase an existing interstate bridge which spans the Missouri river between Sioux City, Iowa, and South Sioux City, Nebraska, under and by virtue of chapter 87, Laws 1935 (Comp. St. Supp. 1937, secs. 39-2101 to 39-2112). The trial court held that the defendant county was without authority to purchase the bridge, and all defendants appeal to this court.

There is only one question of substantive law involved in this case and that is: Does the county bridge act of 1935 (Laws 1935, ch. 87) authorize a border county merely to *build* a bridge across a boundary stream or does it authorize such county to either *build* a bridge or *purchase* one already built? In view of the fact that a determination of this question is decisive of the case, we will not discuss other alleged errors assigned in the briefs.

Section 1 of the act provides in part as follows: "Any

county in the state of Nebraska may build or construct or aid in the construction or complete construction of any highway, wagon, vehicle or automobile bridge within the state of Nebraska and any adjoining state across any river, navigable or nonnavigable stream, forming a boundary line between any county within the state of Nebraska and any other state of the United States."

Section 2 provides in part as follows: "Any county in the state of Nebraska may issue revenue bonds to construct or to aid in the construction, or complete the construction of any highway, wagon, vehicle or automobile bridge within the state of Nebraska and any adjoining state across any river, navigable or nonnavigable stream, forming a boundary line between any county within the state of Nebraska and any other state of the United States."

Section 5 states in part: "If any such county, prior to the passage of this act, has acquired, purchased, or received an assignment by gift or otherwise, any existing highway, wagon, vehicle or automobile bridge or viaduct * * * same shall be and is hereby declared legal and valid and the property of the county and of the same force and effect as if said property had been heretofore directly acquired by the county."

Section 7 also states in part: "No election and no vote of electors shall be required upon the question of acquiring or constructing any bridges or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge, if the governing body of the county shall determine by a vote of a majority of its members to dispense with such election or vote of electors as to such question."

It will readily be observed that section 1 of the act states that a county "may build or construct or aid in the construction or complete construction" of a bridge and that nothing is said with reference to the purchase of a bridge. It will also be observed that section 2 provides for the issuance of "revenue bonds to construct or to aid in the construction, or complete the construction" of a bridge, and,

as in the previous section, nothing is stated with reference to the purchase of a bridge. In section 5 the statement is made that if a county "has acquired, purchased, or received an assignment by gift or otherwise," any existing bridge, the same is declared valid. This being a validating act of past transactions, it might well be said that it does not of itself empower a county to acquire, purchase or receive by assignment, a bridge in the future. The claimed authorization to purchase is found in section 7 wherein it is said: "No election and no vote of electors shall be required upon the question of acquiring or constructing any bridges or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge." The issue to be determined resolves itself into a question whether this provision of section 7 of the act authorizes the purchase of the bridge involved in this case.

It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will. It is the duty of the court to discover, if possible, the legislative intent from the statute itself. It must be borne in mind that, in the legislative field, the legislature is supreme so long as it keeps within constitutional limits, and it is not the province of the court to read a meaning into a statute that the language used does not warrant. *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138; *McCann v. McLennan,* 2 Neb. 286; *State v. Drexel,* 75 Neb. 614, 106 N. W. 791; *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.,* 114 Neb. 734, 209 N. W. 497; *State v. Thomas,* 127 Neb. 891, 257 N. W. 265.

If we give effect to the words used in section 7 of the act, in the sense in which they are ordinarily used, we must necessarily hold that it was the legislative intent that counties coming under the act might purchase as well as

build an interstate bridge. Unless the words "acquiring and constructing" and "acquisition or construction" contained in section 7 are held to be meaningless or superfluous, we can arrive at no other logical conclusion. Following the rules of statutory construction hereinbefore stated by giving the usual and ordinary meaning to every word, clause and sentence with a view of arriving at the legislative intent, we feel that the only conclusion that can be logically reached is that the legislature intended that counties coming within the act were to be empowered to purchase as well as construct, complete or aid in the construction of an interstate bridge. It might be pertinent to inquire, unless such authority was intended, how a county would become possessed of a partly completed bridge for the purpose of completing it except by purchase. Assuming, for the sake of argument, that the language used in section 7, when considered with other language in the act, results in ambiguity and uncertainty and casts doubt as to what the legislature intended, we may then resort to an examination of the title to the act as an aid to construction. In *State v. City of Lincoln, supra,* we said: "In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act."

The title to the act under consideration provides in part as follows: "An act relating to bridges; to define the terms 'county' or 'counties' wherever used in this act; to authorize counties in the state of Nebraska to build and construct a bridge or bridges; * * * to authorize any county to acquire by purchase, gift or otherwise any existing bridge, viaduct or right-of-way or approaches or appurtenances thereto and to validate any acquisition heretofore made of any thereof; to acquire all necessary real estate and personal property; to acquire real estate and personal property located in an adjoining state." Laws 1935, ch. 87.

Applying the rule announced to the title of the act before

us, we find the legislative intent expressly stated in the words "to authorize any county to acquire by purchase, gift or otherwise any existing bridge." By giving the entire statute the meaning that the legislature intended, we are driven to the conclusion that the act authorizes the purchase of interstate bridges by counties that fall within its provisions.

For the reasons stated, the judgment of the trial court is

REVERSED.

RUBEN O. CARLSON, APPELLEE, V. CONDON-KIEWIT COMPANY, APPELLANT.

283 N. W. 220

FILED JANUARY 6, 1939. No. 30558.

1. **Workmen's Compensation**: "Daily Wages." In construing subdivision (3) of section 48-121, Comp. St. 1929, the term "daily wages" should be taken to be the amount that could be earned by working the ordinary number of hours, irrespective of enforced idleness during working hours and overtime employment.
2. ———: INJURY: AWARD. Where, as in the instant case, the contract of hire fixes the maximum number of hours to work each day and the maximum number of days to work each week, they should be considered in reducing the hourly rate to a weekly rate as the basis for an award under subdivision (3), section 48-121, Comp. St. 1929, where the employment is neither continuous, seasonal, nor dependent upon the weather.
3. ———: ———: ———. The provisions of subdivision (3) of section 48-121, Comp. St. 1929, are exclusive, and an employee may not recover, in addition to the schedule therein set out for the loss of an eye, an additional amount for the loss of stereoscopic vision, it being incidental to the loss of an eye.
4. ———: PENALTY. When a reasonable controversy exists between an employer and employee as to the amount due under the workmen's compensation law, an employer is not liable for the penalty for waiting time during the time the cause is pending a final determination in the courts.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Hall, Cline & Williams and *E. W. Cahow*, for appellant.

H. D. Hunter and *Lowell L. Walker, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is a suit to recover benefits under the workmen's compensation law. The main question presented is the method to be employed in determining the employee's wage for the purpose of fixing the amount of compensation.

The plaintiff was injured on June 23, 1937, while employed as a drag-line operator by the defendant who was engaged in carrying out a construction contract on the hydroelectric project of the Loup River Public Power District. At the time of the accident, plaintiff was assisting in placing the teeth on a drag-line bucket and was struck in the right eye by a piece of steel, resulting in the loss of the eye. The controversy over the weekly compensation rate arises out of the following factual situation: The employer was governed by regulations imposed by the federal Public Works Administration fixing a maximum week of 40 hours for employees on this project. Plaintiff did not work full time, but was employed off and on as needed during a period of nine and one-half weeks. He worked two days in each of the first two weeks, he did not work at all during the next four weeks, and worked two days, three days and two days, respectively, in the last three weeks preceding the injury. It is not disputed that plaintiff was paid 55 cents per hour for his work.

Defendant contends that the average weekly wage actually earned by the plaintiff during the five weeks he actually worked, amounting to $7.48 per week, is the sum upon which compensation should be based. Plaintiff contends that the wage to be used in determining the amount of compensation is $22 per 40-hour week.

The schedule of compensation for the loss of an eye under the workmen's compensation law is: "The following schedule of compensation is hereby established for injuries resulting in disability: * * * For the loss of an eye, sixty-six and two-thirds *per centum* of the daily wages during one

hundred and twenty-five weeks. * * * Provided, that, if at the time of injury, the employee receives wages of less than six dollars per week, then he shall receive the full amount of such wages per week as compensation." Comp. St. 1929, sec. 48-121.

The compensation law also provides: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. * * * In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer; the calculation, furthermore, to be made with reference to average earnings for a working day of ordinary length and exclusive of earnings from overtime." Comp. St. 1929, sec. 48-126.

The record in this case shows that the plaintiff worked only eleven days in nine and one-half weeks. This is not continuous employment within the meaning of the quoted provisions of the act. While it is true that a maximum week of five days and forty hours was stipulated, yet the plaintiff worked only when needed by the defendant. It was in no sense continuous employment and was not intended so to be. Clearly, also, it was not seasonal or employment dependent upon the weather as defined therein. This being true, the case is governed by the first sentence of section 48-126, Comp. St. 1929, providing that the term "wages" as therein used "shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." See *Davis v. Lincoln County,* 117 Neb. 148, 219 N. W. 899.

Compensation for the loss of an eye is provided for in subdivision (3) of section 48-121, Comp. St. 1929, which specifies the benefits to be paid for specific injuries. Under

this section plaintiff is entitled to receive 66⅔ *per centum* of the daily wages during 125 weeks. It is not disputed in the record that plaintiff received 55 cents per hour as wages and that the working day was eight hours in length. In other words, the plaintiff, for the purpose of this suit, was earning $4.40 per day. Plaintiff is therefore entitled to receive 66⅔ *per centum* of this wage for 125 weeks. In reducing the hourly rate to a weekly rate, the method ordinarily employed would be to multiply the daily wage by the number of working days composing a work week in the occupation in the community where the injury occurred. But, in the instant case, the employment was limited to five work days of eight hours each per week. This must be taken into consideration in determining the weekly rate which in the instant case amounts to $22 per week. *Drum v. Omaha Steel Works*, 129 Neb. 273, 261 N. W. 351; *Gorham v. Kiewit Sons Co.*, 129 Neb. 277, 261 N. W. 353.

The average weekly earnings are not material in this case for the reason that the employment was not continuous, seasonal, nor dependent upon the weather, within the meaning of the compensation law. Under this situation wages must be construed to be the money rate at which the services were recompensed. What is to be considered is not the wage in fact received, but the rate which the contract of hire fixed, whether that wage was in fact realized or not. See *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. Law, 26, 93 Atl. 85.

It was clearly the intention of the legislature in establishing a schedule of benefits for the listed specific injuries to fix such benefits without regard to the extent of the subsequent disability of the injured employee. The period for payment of benefits is definitely fixed at 125 weeks. The rate of payment is clearly based upon the daily wage, not upon an average wage. The language is plain and unambiguous, and is not susceptible of other construction. In commenting on the same section of the statute, this court said: "Perhaps it was thought that the period

during which compensation was allowed would be sufficient to allow the injured workman to fit himself for some other kind of occupation, or that if a man lose the use of an eye, or hand, or arm, or leg, or foot, and is otherwise competent and in good health, this should not compel an employer, who perhaps has been guilty of no negligence, to bear the burden of his support indefinitely. The law seems intended to help the injured workman to help himself. Whatever the legislative motive or intent may have been, we cannot disregard the plain words of the statute." *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N. W. 628.

We necessarily conclude that the plaintiff in this case is entitled to receive $14.67 per week for 125 weeks as compensation for the loss of his eye. The trial court therefore correctly awarded that amount.

Plaintiff claims that he is entitled to recover for loss of stereoscopic vision in the instant case. Stereoscopic vision may be defined as that function of the eyes which enables us to get the effect of solidity or depth. By its very nature, the vision of two eyes is required to give this effect. Naturally, the loss of one eye destroys stereoscopic vision. In the instant case, plaintiff suffered the loss of one eye, the other being uninjured. The compensation set forth in subdivision (3), section 48-121, Comp. St. 1929, is exclusive and includes all impairments that naturally follow the loss of an eye. We hold that plaintiff is not entitled to an award for loss of stereoscopic vision, it being included in the benefits awarded for the loss of an eye.

The plaintiff claims that he is entitled to a penalty for the delay of payments because there was no reasonable cause for controversy. This court has many times held: "Where a reasonable controversy exists between an employer and an employee, as to the former's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time during the time the cause is pending in the courts for final determination."

Claus v. DeVere, 120 Neb. 812, 235 N. W. 450. The case at bar does present a reasonable controversy between the employer and employee. In fact, it presents a situation that has never before been before this court. The trial court properly denied the penalty asked for.

In view of the conclusion reached, it is not necessary to consider other assignments of error set out in the briefs. We conclude that the judgment of the trial court was in all respects correct. An attorney fee of $100 is allowed plaintiff's attorneys for presenting the case in this court.

AFFIRMED.

IN RE ESTATE OF SOPHIA LEHMAN. RUTH PRESENT ET AL., APPELLEES, V. ARTHUR KOCHENTHAL ET AL., EXECUTORS, APPELLANTS.

283 N. W. 199

FILED JANUARY 6, 1939. NOS. 30430, 30431.

1. **Appeal.** Section 30-1601, Comp. St. 1929, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." *Held*, such orders made during the progress of probate proceedings, allowing fees for services, extraordinary or otherwise, to executors, and orders of partial distribution, even though notice by publication is given, as provided by section 30-1414, Comp. St. 1929, are interlocutory and intermediate and not final, and are not appealable.
2. **Executors and Administrators.** Section 30-1414, Comp. St. 1929, requiring notice by publication of administration accounts, contemplates final accounts of executors or administrators and final adjudication thereon.
3. ———: COMPENSATION. Section 30-1411, Comp. St. 1929, as amended by chapter 74, Laws 1937, fixes the schedule of fees for personal representatives of deceased persons, and provides for allowance of fees for extraordinary services rendered by such representatives.
4. ———: APPEAL. Section 30-1306, Comp. St. 1929, provides: "Any person aggrieved by any order, decree, or denial of a

court in pursuance of the provisions of this article, may appeal therefrom as provided for in other cases." This section of the statute is in article 13, of chapter 30, Comp. St. 1929, making provision for the administration of the estates of decedents, and pertains specifically to decrees and orders of the county court, assigning the estate to persons by law entitled thereto, and directing distribution of the estate to heirs, legatees and devisees of decedent. Said section contemplates appeals from such decrees and orders and from decrees and orders denying distribution.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Reversed.*

Morsman & Maxwell, for appellants.

Webb, Beber, Klutznick & Kelley and *Loyal G. Kaplan, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

MESSMORE, J.

On August 1, 1927, Sophia Lehman, a resident of Omaha, Nebraska, died, leaving a last will and testament, listing some 35 legatees, most of whom were nephews and nieces. The personal property of the estate amounted to $76,894.07 and the real estate to $119,000, the total estate amounting to $195,984.07. The estate, due perhaps to economic conditions, appears to have been overvalued in the inventory. The will provided for the appointment, as executors, of Jesse Kochenthal, Arthur Kochenthal, both of Rochester, New York, and Maurice Ollhouse of Omaha, nephews of the deceased. Maurice Ollhouse lived with and cared for the property of Sophia Lehman during a part of her lifetime, and the will provided that he be allowed $1,000 a year, to be paid in instalments of $250 a quarter, as long as he managed the property of the estate as one of the executors. The will further provided that the executors have complete charge of the property of the estate, to supervise, rent, repair, insure and sell and convey the real estate, and exercise their own best judgment in the

care, supervision and sale thereof to the best advantage to the estate. Maurice Ollhouse left for Germany in August, 1929, and has never returned. The two remaining executors were then charged with the full responsibility of managing the estate. The deceased, by her will, exhibited full confidence in the executors; she required no judicial order to be obtained for the sale of real estate, and required no bond to be given. The executors gave a nominal bond in the sum of $100.

Two cases are before us in these appeals by the executors, and, by agreement, have been consolidated for purposes of briefing and presentation. A large number of pleadings in the county and district courts were filed, which will be hereinafter concisely set out.

In November, 1935, appellees filed in the county court an application for an order modifying former orders entered therein, in which the court allowed compensation to the executors in sums aggregating $8,200, and asking that the amount be reduced to the sum of $1,200, which appellees contend are the statutory amounts to be allowed in such cases. On May 8, 1936, the county court denied the appellees' application of November, 1935. July 15, 1936, appellees filed their application in the district court, setting forth the same allegations as by their application set forth in the county court, and praying for a modification of the decree of the county court accordingly. November 12, 1936, the executors filed their motion to dismiss the appeal, for the reason that the county court's order of May 8, 1936, was not a final order and was not, therefore, an appealable order. January 7, 1937, this motion was overruled. March 15, 1937, the executors demurred to appellees' application, challenging the sufficiency thereof. March 31, 1937, the demurrer was overruled. April 10, 1937, the executors filed their answer, challenging the sufficiency of the appellees' pleading, and, in addition thereto, giving the history of the proceedings and their acts as such executors, setting forth a history of the reports filed by them and the extraordinary services they claim

to have rendered the estate; further, that the decree of the county court entered June 6, 1928, was entered after due publication of notice to all parties in interest, as provided by law, from which no appeal was taken. The answer pleaded the account of the executors, covering their acts as such executors from April 30, 1928, to October 31, 1931, and the decree of the county court allowing $1,400 each to the three executors, pursuant to the decree of June 6, 1928; that in the decree of the county court of December 24, 1931, from which no appeal was taken, the court specifically found that appellants were entitled to compensation for their services in addition to the amount allowed them by the decree of June 6, 1928, but, owing to the small amount then in their hands for distribution among the residuary legatees on the account filed December 1, 1931, they had consented that the matter of the allowance to them therefor and the amount thereof be postponed; that on August 21, 1934, appellants filed their petition for the administration proceedings, setting forth that they had received no compensation for their services as executors subsequent to June 6, 1928; that the gross amount coming into their hands subsequent to April 30, 1928, from rentals and other income, was approximately $51,000; they asked for an allowance of $5,000; that on August 21, 1934, the court allowed $4,000 for services and directed that the amount be divided equally; that, pursuant to such order, $2,000 was paid to each of these executors, and such disbursements were shown in the account filed by the executors in the county court November 12, 1935, covering their acts for the period from October 31, 1931, to October 31, 1935, which amount was allowed by the county court December 9, 1935.

April 21, 1937, appellees filed a motion to strike all of the executors' answer, except their appointment and qualification as executors. May 24, 1937, the motion was sustained. February 5, 1938, judgment in the district court was entered in favor of appellees, finding: On June 6, 1928, the county court allowed $4,200 to appellants and

Maurice Ollhouse for services as executors, each executor to receive $1,400; on August 21, 1934, the county court allowed an additional sum of $4,000, divided between the two remaining executors, each receiving $2,000. The district court found that the reasonable value of the services rendered by appellants as executors of the estate, on account of which they were allowed $6,800, was not to exceed $2,400, and that the county court abused its discretion when it allowed the appellants any amount in excess of $2,400; modified the order, requiring the executors to pay back to the estate the difference between $6,800 and the sum of $2,400.

This appeal involves the allowances made by the county court to the executors, and the evidence in the county court is of a documentary character. An examination of the reports filed by the executors shows an accounting in detail of the amounts collected for rents from real estate and from personal property and disbursements made. One report discloses an adjudication of the claim of Maurice Ollhouse, filed in the estate proceedings, in the amount of $79,000, and the participation of the executors in the adjudication of such claim, resulting in special benefits to the estate, by settlement had thereon, in the sum of $8,500. The reports further disclose the requests for fees for services rendered by the executors, extraordinary and otherwise, and are sufficient in this respect, and show amounts on hand and requests for partial distribution. The reports also show that the executors requested continuance on payment of fees in their behalf, due to lack of sufficient funds at the time to pay both their fees and partial distribution as prayed.

The principal question is whether or not the order of the district court, overruling the motion to dismiss the appeal, determined that the order of the county court of May 8, 1936, appealed from, was a final order, subject to review on appeal, and whether or not the judgment of the district court determined that the order of the county court of August 21, 1934, awarding compensation to executors, was

a final order and subject to review on the appeal from the county court's order of May 8, 1936.

Section 30-1601, Comp. St. 1929, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." This provision of the statute appears under article 16, "Appeals in Probate Matters."

In the case of *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001, this court held:

"The county court has exclusive, original jurisdiction of the probate of wills and the settlement of estates, and its final orders within its jurisdiction are binding upon all parties. * * *

"An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court."

In *Bachelor v. Schmela,* 49 Neb. 37, 68 N. W. 378, it was held: "The law recognizes a substantial difference between the final settlement of the accounts of an executor or administrator and those made annually or at any stated periods during the course of the administration. A final settlement made pursuant to notice to persons interested in the estate is in the nature of a judgment and conclusive as to all matters included therein until reversed or set aside by means of a direct proceeding, or impeached on account of fraud, while an interlocutory (meaning intermediate and not final) *ex parte* accounting is but *prima facie* correct and subject to reexamination so long as the administration account remains unsettled." The case of *Boales v. Ferguson,* 55 Neb. 565, 76 N. W. 18, follows the rule as stated in *Bachelor v. Schmela, supra.*

In the case of *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316, it was said: "It will be observed that the controversy relates entirely to the accounts of the administrator and is between the administrator and the estate. We have observed no final order of the court discharging

the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only, and not final orders," —citing *Bachelor v. Schmela, supra.* The accounts filed by the executors in the instant case and allowed by the county court were allowed, as shown by the record, on statutory notice to all parties in interest. None of the accounts were final accounts. The notice was published by order of the court on each of the accounts.

Section 30-1414, Comp. St. 1929, in part provides: "Before the administration accounts of any executor or administrator shall be allowed, notice thereof shall be given to all persons interested, of the time and place of examining and allowing the same, and such notice shall be given by publication three (3) successive weeks in a legal newspaper published within the county, or if no legal newspaper is published within the county, then in a legal newspaper published in an adjoining county."

In *Thompson v. Pope,* 77 Neb. 338, 109 N. W. 498, we find this language at page 342: "Our statutes with reference to the collection and administration of the estates of deceased persons derive their origin in the first place from Massachusetts. It has been said that they have come to us by way of New Hampshire, Michigan and Wisconsin." The Massachusetts probate law is comprehensive but contains no provisions on notice, as shown by section 30-1414 of the Nebraska statute, but the Michigan statute, in substance, provides for notice and is similar to our provision of the statute in this respect, with the exception that oral notice may also be given.

In *Morton v. Johnston,* 124 Mich. 561, 83 N. W. 369, the Michigan statute was held to be applicable to all accounts of executors and administrators, whether final or intermediate. The court held that the case of *Musick v. Beebe,* 17 Kan. 47, did not apply in view of the Michigan statutes. The *Musick* case was referred to in *Bachelor v. Schmela, supra,* as authority for the court's decision.

In *Schinz v. Schinz,* 90 Wis. 236, 63 N. W. 162, there

was an order settling an intermediate account of the executor on notice to the parties in interest. The court said (p. 247): "The appellants now claim that this settlement was not final and conclusive upon the matters embraced in it. * * * We have no doubt of the right of the county court to settle and allow an executor's or administrator's account at any time before the rendition of his final account, upon notice as provided in the statute (R. S. sec. 3931), and that when thus settled and allowed it will be final and conclusive as to all matters embraced in it, and can be impeached and reopened only for fraud or mistake."

Thus, we have the appellants' contention and query as to whether or not the county court's orders in the instant case were final, or, if intermediate or interlocutory, were appealable as final when notice is given, as provided by section 30-1414, Comp. St. 1929. Our court has not decided the question, and it is here on first impression. The county court has exclusive, original jurisdiction over the probate of estates and settlement of accounts. In the instant case, upon showing made to the county court for services rendered by the executors and partial distribution made by such executors to the parties entitled thereto, the county court made several orders; due and proper notice was given as provided by section 30-1414, *supra*, in the settlement of administration accounts of the executors. Section 30-1601, Comp. St. 1929, provides for appeals from final order, judgment or decree. Our court is committed to the rule that such orders, as made by the county court in the instant case, are intermediate or interlocutory orders and very often are made *ex parte*. There is no decision in this state holding that statutory notice, as required by section 30-1414, *supra*, would make such order a final order.

We see no particular reason why the rule should be changed at this time. There may be criticism in that large estates, consisting of some considerable real estate, might be kept open indefinitely, to the loss of those interested in

the estate, and the estate might be divested of its assets, to the damage of the interested persons. This position is not well taken. Many protective remedies exist by virtue of statute and are entirely adequate to protect all parties in interest. Ordinarily, an adequate bond is required in large estates, regardless of the provision in the will to the contrary, as a means of protection both to the court and the parties interested, and the will is not conclusive in this respect. To permit appeals on many separate orders, as in the instant case, would lead to a multiplicity of suits and additional expense, and would result in appeals pending in different courts all at one time, thus unnecessarily delaying the progress of administering the estate. The heirs might, in situations as presented by the instant cases, especially where they charge negligence on the part of the executors, having authority under the will, in refusing to sell real estate, resort to an application for an order to show cause; then an application to remove the executors might be resorted to, and, on an adverse ruling thereon, appeal may be had. *In re Estate of Pope*, 75 Neb. 550, 106 N. W. 659; *In re Estate of Vohland, ante*, p. 77, 280 N. W. 241. Such application was filed in the instant case and no appeal taken.

In *In re Estate of Wilson*, 83 Neb. 252, 119 N. W. 522, this court held: "For services rendered by H. in a business way, such as collecting rents of real estate, paying taxes thereon, insuring property, and attending to repairs, it was within the discretion of the court, if the evidence established that such services were extraordinary, to allow H. a reasonable compensation." See, also, *In re Estate of Wilson*, 86 Neb. 175, 125 N. W. 158.

Section 30-1411, Comp. St. 1929, provides for the commissions, schedule allowed, and for extraordinary services. So we have sufficient authority for the allowance to the executors of a reasonable fee for extraordinary services.

Appellees cite section 30-1306, Comp. St. 1929, which provides: "Any person aggrieved by any order, decree, or denial of a court in pursuance of the provisions of this

article, may appeal therefrom as provided for in other cases." Appellees state that the appeal in the instant case is based on an order of distribution and the heirs are aggrieved. This section of the statute appears under article 13, entitled "Distribution of Estate." The reports of the executors request the right to make partial distribution; such distribution is in no sense final, is and at all times should be subject to review by the court having original and exclusive jurisdiction in such matters. Section 30-1306, *supra,* pertains specifically to decrees and orders of the county court, assigning the estate to persons by law entitled thereto, and directing distribution of the estate to heirs, legatees and devisees of the decedent. This section contemplates appeals from such decrees and orders, and from decrees and orders denying distribution. We believe that section 30-1601, Comp. St. 1929, is the provision governing appeals in probate and administration of estates.

The district court did not have jurisdiction to entertain the appeals, in the instant cases, from such orders sought to be appealed from, made by the county court for partial distribution and allowances of executors' fees. Such orders, under the law of this state, were interlocutory orders and not final orders, within the meaning of section 30-1601, Comp. St. 1929.

The executors rendered an account of their services from October 31, 1935, to February 15, 1937, including certain items of expense charged by the executors while in attendance on probate proceedings in the county court. April 5, 1937, appellees filed objections to the account, alleging that the executors had not filed an itemized statement as to their services and had performed no extraordinary services; alleging further that an appeal was pending in the district court by the appellees to have the executors refund certain fees. The county court made an allowance of additional fees to the executors for services rendered from August 21, 1934, to date, in the amount of $1,650. Subsequently, the appellees filed additional objections in the county court,

setting forth certain specific objections and, in addition thereto, alleging negligence on the part of the executors in handling the real estate, particularly in refusing to accept offers of purchase of the real estate. The county court overruled all of the objections filed by the appellees; hence the appeals. In the district court the executors filed a motion to dismiss the appeals from such orders of the county court. The motion to dismiss the appeals in the district court should have been sustained for the reasons given in this opinion.

The judgments of the district court are hereby

REVERSED.

IN RE ESTATE OF JACOB JENSEN. DANNEBROG LODGE NO. 216, I. O. O. F., APPELLEE, V. DANIA OLD PEOPLE'S HOME, APPELLANT.

283 N. W. 196

FILED JANUARY 6, 1939. No. 30435.

1. **Courts.** County courts have equity jurisdiction incidental to powers properly conferred by statute.
2. **Judgment: VACATION: PLEADING.** A petition filed more than two years after judgment was entered, seeking to set aside judgment for fraud, which shows on its face that fraud was discovered within two-year period, does not state a cause of action.
3. **Wills.** Specific legatee and residuary legatee, being the only persons interested, may agree upon a disposition of legacy different from that provided for in the will.
4. **Executors and Administrators.** Evidence examined, and *held* insufficient to sustain allegations of fraud.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed, with directions.*

John M. Berger, for appellant.

T. Victor Jorgensen and *Raymond T. Coffee, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

On May 25, 1926, one Jacob Jensen, a resident of Douglas county, died testate. His will was duly admitted to probate, and the only provisions thereof that are involved in this proceeding are paragraphs 15 and 16, which are as follows:

"Fifteenth: One (1) year after my death, pay to Dania Old People's Home, Omaha, Nebraska, if established or operating at that time, One Thousand and Five Hundred Dollars ($1,500.00). If the said Home is not in working order, hold that money for ten (10) years. After that time, pay it to Dannebrog Lodge No. 216, I. O. O. F. Omaha, Nebraska.

"Sixteenth: All the rest and residue of my estate, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, and remaining after the satisfaction of the above bequest and devise and any devise and bequest which may fail for any cause whatsoever, I give, devise and bequeath to Dannebrog Lodge No. 216, I. O. O. F. Omaha, Nebraska."

Frank V. Lawson was appointed administrator with the will annexed and on February 26, 1932, filed his final account and application for discharge. Due notice of this application was given and on March 22, 1932, an order was entered discharging said administrator and directing distribution.

Thereafter and on October 13, 1936, a petition was filed in the county court of Douglas county, Nebraska, in the Jacob Jensen estate by Dannebrog Lodge No. 216, I. O. O. F., the residuary legatee, seeking to have the order of March 22, 1932, set aside and an order entered that the $1,500 mentioned in said paragraph 15 of the will be declared and determined to be the property of said Dannebrog Lodge No. 216, I. O. O. F., alleging that said order was obtained by fraud which was not discovered by the petitioner until May, 1936.

To this petition the administrator and the Dania Old People's Home filed their demurrer, challenging the juris-

diction of the court and the sufficiency of the petition. This demurrer was overruled, and thereupon answers were filed by the administrator and Dania Old People's Home, and on November 17, 1936, the county court of Douglas county entered an order setting aside the order of March 22, 1932, and on November 24, 1936, entered a decree construing paragraph 15 of said will and directing the administrator to deliver and pay to Dannebrog Lodge No. 216, I. O. O. F., the money therein mentioned.

From the action of the county court, an appeal was taken to the district court for Douglas county by the Dania Old People's Home. The petition of appellee was attacked by what was designated a motion for judgment on the pleadings, which was, in effect, a demurrer, and again raised the question of the jurisdiction of the probate court and the sufficiency of the petition, which motion was overruled, and appellant and the administrator filed their answers.

For some reason not disclosed by the record, the case was treated as a law action, a jury was impaneled, trial had, and, at the close of all of the evidence, the court sustained a motion of the appellee to dismiss the appeal. Motion for new trial was filed and, from an order overruling this motion, this appeal is prosecuted.

Numerous errors are assigned, but the contention of appellant may be briefly summarized, as follows:

First, that the jurisdiction of the county court to vacate its decree of March 22, 1932, was limited to a period of two years by section 20-2008, Comp. St. 1929;

Second, that appellee's petition did not state facts sufficient to constitute a cause of action; and

Third, that the evidence of appellee was not sufficient to sustain the allegations of its petition.

The argument that the county court had no jurisdiction to vacate its decree in this case is based on the contention that the county court has only such powers as are given it by statute; that section 20-2001, Comp. St. 1929, provides for the vacation or modification of judgments at a sub-

sequent term upon certain grounds, among which is "Fourth. For fraud practiced by the successful party in obtaining the judgment or order;" that section 20-2008, Comp. St. 1929, provides that proceedings to vacate or modify a judgment or order on account of fraud must be commenced within two years after the judgment was rendered, with certain exceptions not applicable to this case; and that section 20-2009, Comp. St. 1929, makes these provisions applicable to supreme and county courts.

This court has, however, held that the statute enumerating grounds upon which a judgment may be vacated after term does not provide an exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. *Pavlik v. Burns,* 134 Neb. 175, 278 N. W. 149; *Howard Stove & Furnace Co. v. Rudolf,* 128 Neb. 665, 260 N. W. 189.

In the case of *In re Estate of Kelly,* 103 Neb. 524, 175 N. W. 653, this court held that, since the county court has exclusive original jurisdiction in probate matters, it has ample power to set aside probate decrees procured by fraud, independent of statute, citing *Genau v. Abbott,* 68 Neb. 117, 93 N. W. 942, and *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. Again, in *Gainsforth v. Peterson,* 114 Neb. 442, 207 N. W. 935, it was held that county courts have equity jurisdiction incidental to powers properly conferred by statute.

Since the decree attacked in this case was entered in a probate matter, the county court had jurisdiction to entertain an action to vacate said decree even though such proceedings were equitable in their nature and not brought within the time fixed by statute.

Appellant's second contention is that the petition of appellee did not state facts sufficient to constitute a cause of action. In the petition it is alleged that fraud had been practiced upon one William Jorgensen, purporting to represent the appellee, as a result of which Jorgensen was induced to approve the decree. The specific fraud alleged is that the administrator, by filing with the court a receipt therefor, represented to the probate court that he had turned over to the Dania Old People's Home the legacy

provided for in paragraph 15 of said will, whereas, in truth and in fact, he had not done so, but had entered into an agreement with said William Jorgensen, by the terms of which he agreed to hold said money for a period of ten years and, at the end of that time, turn it over to the Dannebrog Lodge No. 216, I. O. O. F., if the Dania Old People's Home was not at that time completed and in working order.

While the petition alleges that the fraud was practiced on William Jorgensen, the only fraud pleaded is fraud upon the court, and the petition, on its face, shows that Jorgensen at all times knew the true facts, and there is no showing in the petition why the action was not brought within the statutory period of two years. Under the circumstances, the petition did not state a cause of action and the demurrer should have been sustained. See *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298.

When, in connection with the third assignment of error, we examine the record to ascertain what the evidence on behalf of petitioner discloses, we find that the only evidence bearing on fraud offered by appellee was the testimony of William Jorgensen, and his testimony is that, at the time the decree of March, 1932, was entered, he knew all of the facts in connection therewith, knew that the administrator had not paid the money to the Dania Old People's Home, and knew that the administrator had entered into an agreement with representatives of the Dania Old People's Home and William Jorgensen, as representative of Dannebrog Lodge No. 216, I. O. O. F., to close the estate at that time in order to save the premium on the administrator's bond. According to this agreement, the administrator was to hold the money until the expiration of ten years from the death of testator, at which time the money was to be turned into court to be disposed of as the court should direct. The receipt obtained from the Dania Old People's Home was for the purpose of closing the estate, and the interested parties all knew that the money had not actually been paid over to said home.

That William Jorgensen had the authority to represent the petitioner is clearly shown by power of attorney given him by Dannebrog Lodge No. 216, I.O.O.F., under date of March 20, 1931, and any agreement entered into by said William Jorgensen would be binding on the appellee.

The evidence falls far short of supporting the allegations of appellee's petition. There was no fraud practiced on any one. On the contrary, all of the parties seem to have acted in good faith with a desire to avoid unnecessary expense. The Dania Old People's Home and the residuary legatee were the only parties interested in the $1,500 legacy. They had a perfect right to agree between themselves for a disposition of the legacy other than that stipulated in the will. 69 C. J. 1274; *In re Murphy's Estate,* 217 Ia. 1291, 252 N. W. 523. So far as the evidence in this case discloses, they did not go that far. According to the evidence, they agreed that, instead of holding this money as administrator, Frank V. Lawson was to hold the money as trustee for the stipulated period and at the end of that time, if the parties could not agree upon its disposition, it was to be paid out as the court might direct.

An examination of the entire record discloses that there was no fraud committed by any one, hence there was no occasion for invoking the equity powers of the county court.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the county court and directing that the action be dismissed.

REVERSED.

IRVIN E. WATENPAUGH, APPELLEE, V. L. L. CORYELL & SON ET AL., APPELLANTS.
283 N. W. 204

FILED JANUARY 6, 1939. No. 30397.

1. **Negligence.** In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, it was

not enough in order to entitle plaintiff to recover merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff was required to go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of defendant in one or more of the particulars claimed.

2. ———. The gist of an action for damages from a fire is negligence, and by negligence is meant the doing of some act under the circumstances surrounding the fire involved which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.
3. ———. The term negligence is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society.
4. ———: BURDEN OF PROOF. In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, the burden was on plaintiff to prove that the negligence charged was the proximate cause of his damages.
5. ———. In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, evidence of plaintiff which failed to show the cause of the fire was insufficient to justify the submission of the case to the jury.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Walter C. Weiss, Tunison & Joyner and *Richard B. Travis,* for appellants.

Baldwin & Baldwin, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

LANDIS, District Judge.

The principal question for decision is whether the judgment on the verdict rendered in the court below for plaintiff, Irvin E. Watenpaugh, against the defendants L. L. Coryell & Son, a corporation, and its employee Emil A. Hebel, for damages to personal property, situated on adjacent premises, destroyed by fire alleged to have been

caused by negligence, is sustained by sufficient evidence.

Defendants joined issue by general denial to plaintiff's claim of negligence set out in his petition as:

"That on the premises occupied by the defendants * * * was a certain room, about seven feet by seven feet, which was used by said defendants as an office; that in said room defendants had erected or caused to be erected a heating stove; that on the night of January 2, 1937, the defendant, Emil A. Hebel, carelessly and negligently allowed oily coats, jackets, blankets and other combustible materials to be hung up and accumulated in said room; that at said time and on said date said defendant, Emil A. Hebel, carelessly and negligently kindled and built up a large and extremely hot fire in said stove, and carelessly and negligently left said office room with no one to watch and regulate said fire; and that in a few moments thereafter said stove became overheated and as a result of the carelessness and negligence of said defendant the buildings located on said premises were damaged and destroyed by fire."

Plaintiff's evidence to sustain his claim of negligence showed that there was an office room 7 foot square in the northeast corner of the transport shed which contained on the night of the fire a cast-iron heating stove 35 inches high, with a 14-inch fire bowl, with a fire in it, a coal bucket containing nut size soft coal, a shelf table, above this pigeonholes for filing reports, with paper reports on the table and in the pigeonholes, a box on the floor, 10 or 11 unionalls hanging on the walls, some of these within 18 or 24 inches of the stove. These unionalls were used by the men in servicing the trucks and were greasy. Also on the floor were three quart tin cans with screw tops, used to take samples of kerosene out of the trucks to send to the state; that it was cold and windy at the time of the fire; that it started around 10 p. m., January 2, 1937, and when seen the fire was coming out of the roof above, and ceiling of the office.

Between 11 and 11:30, after the fire started, one witness testified as to defendant Hebel: "He said that he had put

in some coal into the stove to build up a fire and had then left the room to go to the lunch room for a cup of coffee." Another witness testified to this same conversation: "He said that he put a little coal, or put coal in the fire, and had went out to get some coffee, and the fire had started while he was out." This same witness testified to a conversation on the day after the fire: "I said, 'then, the fire was attributed to the over-heated stove?'" And he answered "Yes."

On the afternoon of the day after the fire another witness testified to a conversation: "He told me that he built a hot fire in there and then went to the lunch room, and said for me not to mention it to anybody because he didn't want to let it out."

The gist of this action is negligence. It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed.

No presumption of negligence either in the kindling or management of the fire is raised by the destruction of property by it.

"In action for damage by fire, alleged to have spread from defective stove in adjoining building, judgment for plaintiff could not be sustained, where there was no proof that defect in stove caused fire." *Lezotte v. Lindquist*, 51 S. Dak. 97, 212 N. W. 503.

In an action for personal injuries sustained as a result of fire allegedly caused by gas-pipe leak existing by reason of gas company's negligence, we have held in *Mischnick v. Iowa-Nebraska Light & Power Co.*, 125 Neb. 598, 251 N. W. 258, that directed verdict for defendant company was proper in absence of proof showing exact cause of fire.

By negligence is meant the doing of some act, under the circumstances surrounding the fire involved, which a man of ordinary prudence would not have done, or the

failure to do some act or take some precaution which a man of ordinary prudence would have done or taken. It is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society. We should consider whether probable harm to plaintiff's property could have been reasonably anticipated as within the range of defendant's conduct.

The evidence of the plaintiff fails to show the cause of the fire. There was no defect in the stove, stovepipe or chimney; there is no proof that any of the articles in the office room caused the fire. When first discovered it was in the ceiling of the office and the roof above. The tin quart cans with screw tops on the floor, the unionalls hanging on the wall, the paper forms on the table and in the pigeonholes in the wall, the box on the floor, none of these is shown as connected with the fire or the cause of it.

Assuming that the statements of defendant Hebel were competent, which we do not decide, they amount to admitting that he put some coal on the fire and went out for a cup of coffee; expressed an opinion the day after the fire to a question as to what the fire was attributed to, and that he had built a hot fire and went to the lunch room, and asked not to be quoted.

On a cold night, the ordinary use of a stove is to place coal in it and build a hot fire. There is nothing to show that the stove was overheated the night of the fire, nor that an overheated stove caused the fire. There could be many different causes for this fire. We cannot say it is unusual for Hebel to leave the office for a cup of coffee. The burden is on the plaintiff to prove that the negligence charged was the proximate cause of the damages, which this record shows was not sustained.

The evidence introduced by plaintiff was insufficient to submit the case to the jury, and the separate motions of the defendants for a directed verdict made at the end of plaintiff's case in chief should each have been sustained.

The trial court committed error in overruling the motions for directed verdict, and this cause is

REVERSED AND DISMISSED.

GLEN H. GOODMAN, APPELLANT, V. JOSEPH O'GRADY, SR., APPELLEE.

283 N. W. 213

FILED JANUARY 6, 1939. No. 30464.

1. Habeas Corpus: RETURN TO WRIT. In a habeas corpus proceeding against the warden of the state penitentiary, seeking the release of relator from such institution, the return to the writ is *prima facie* evidence of the cause of detention as provided by section 29-2819, Comp. St. 1929.
2. ———. In such a proceeding, when the warden's return to the writ sets out that the relator escaped and remained away from prison for a period of time, and relator, at the hearing, offered no evidence in denial of the return, the return will be considered as true; and where, upon such consideration, it appears that relator's sentence would not be completed until some date in the future, relator is entitled to no relief.
3. Criminal Law. One who escapes and remains away from prison during the period of his sentence is not entitled to have the time that he was absent deducted from the term of his original sentence.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

J. A. Hayward, for appellant.

Richard C. Hunter, Attorney General, and *George W. Ayres, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

LANDIS, District Judge.

Glen H. Goodman sentenced for ten years from Douglas county for manslaughter, now confined in the Nebraska state penitentiary, obtained a writ of habeas corpus against the warden, seeking his release from that institution. Upon hearing the writ was denied by the district court and relator has appealed the case to this court.

The gist of relator's complaint is that his sentence has expired, his contention being that it had not been properly

and sufficiently established, as contended by the respondent, that he had escaped from the Douglas county jail while awaiting transfer to the state penitentiary after the imposition of a penitentiary sentence and had remained away for one year, three months and twelve days before his apprehension.

His attorney in argument admitted his client had been in escape, the return to the writ by the warden sets it out fully, and at the hearing below the only witness was the warden, called by the relator, who testified to it, and relator never denied it.

The return to the writ is *prima facie* evidence of the cause of detention as provided by section 29-2819, Comp. St. 1929.

In *Sanclaer v. State*, 111 Neb. 473, 196 N. W. 686, we have held that the return to the writ is evidence and *prima facie* proof of the things recited therein. Relator at the hearing offered no evidence in denial of the return showing the escape. The warden, as relator's witness, in response to the question, "When has this man's time expired as of record?" answered, "According to my records, this man is subject for release, with the time earned to date, January 24, 1939."

Relator is not entitled to have the time he is out of prison, because of his own fault, deducted from the time he will be required to serve when he is finally captured and delivered to the prison authorities to serve out the time of his original sentence.

The district court properly denied the writ, and the case is

AFFIRMED.

HARLAN H. HENDERSON, APPELLANT, V. JOHN F. GETTMAN, APPELLEE.

283 N. W. 372

FILED JANUARY 13, 1939. No. 30457.

Courts. In a county having a population of less than 50,000, the

county court has jurisdiction to hear and determine a complaint against a child for delinquency, though a judge of the district court may be in the county at the time. Laws 1925, ch. 56; Comp. St. 1929, sec. 43-222.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

Heard before ROSE, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, C. J.

In the district court for Buffalo county in a petition on behalf of Harold Henderson, a minor 14 years of age, it is alleged he is unlawfully deprived of his liberty by John F. Gettman, superintendent of the state industrial school for boys at Kearney. The petition contains a prayer for Henderson's release on habeas corpus. Under a writ directed to Gettman, Henderson, hereinafter called "minor," was produced in court. There was a hearing upon the petition, the return to the writ of habeas corpus and the evidence, and there was a resulting order remanding the minor to the custody of the superintendent of the industrial school. The minor appealed.

A chronology of the proceedings showing the cause of the detention, as disclosed by the return of the writ of habeas corpus and the evidence, follows: October 21, 1936, on complaint of the county attorney of Adams county, minor found by the county court of Adams county to be a delinquent and as such he was paroled to Karl D. Beghtol; November 22, 1937, parol revoked by county court of Adams county for violation of its terms, and order committing the minor as a delinquent to the Nebraska home for dependent children at Lincoln; November 29, 1937, minor delivered to Nebraska home for dependent children; November 30, 1937, resolution by Nebraska state board of control directing

transfer of minor as a delinquent to the state industrial school for boys at Kearney, where he was subsequently detained.

On appeal it is contended on behalf of the minor that his detention is unlawful on the ground that the county court of Adams county was without jurisdiction to hear or determine any complaint of delinquency against him, because a judge of the district court having jurisdiction was in Adams county at the time. This contention is based on a statute which provides:

"The district courts of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this article; the county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Comp. St. 1929, sec. 43-202.

The position of the minor is that the county court is one of limited and inferior jurisdiction in respect to decisions affecting the custody and care of delinquent or dependent children and that its orders in such a capacity are void unless its record shows absence of district judges from the county at the time, citing Constitution, article V, section 16; *Martin v. Sanford,* 129 Neb. 212, 261 N. W. 136; *Foote v. Chittenden,* 106 Neb. 704, 184 N. W. 167; *Murphy v. Lyons,* 19 Neb. 689, 28 N. W. 328. The record of the county court does not show that the judges of the district court were absent from the county in this instance. The habeas corpus record contains a stipulation that a district judge was then in Adams county.

Gettman, as superintendent, defends his custody under the resolution of the state board of control and county court orders made pursuant to the statute providing:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article. In counties having a population of more than fifty thousand, county courts shall

not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Comp. St. 1929, sec. 43-222.

If this section is controlling in the case at bar, the minor is not entitled to release from his present custody, because the population of Adams county was less than 50,000, and the jurisdiction of the county court did not depend on absence of district judges. These two sections were enacted in separate bills by the legislature of 1905 and did not then conflict in any respect. The first was part of an act passed March 8, 1905, under the title "An act to regulate the treatment and control of dependent, neglected and delinquent children." Laws 1905, ch. 59. Under that title the act of March 8, 1905, contained the following provisions on jurisdiction:

"The district court of the several counties in this state and the judges thereof in vacation shall have original jurisdiction in all cases coming within the terms of this act. The county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Laws 1905, ch. 59, sec. 2.

That legislation appeared in the 1913 compilation of statutes, as follows:

"The district courts of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this article; the county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Rev. St. 1913, sec. 1245.

The title of the act of March 21, 1905, was "An act to provide for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children." Laws 1905, ch. 195. Under this title, the provision on jurisdiction reads thus:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this act. In counties having a population of more than 50,000 county courts shall not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Laws 1905, ch. 195, sec. 2.

This legislation appeared in the compilation of 1913, as follows:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article. In counties having a population of more than fifty thousand, county courts shall not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Rev. St. 1913, sec. 1264.

The changing of the word "act" as used in the legislation of March 21, 1905, to the word "article" in the Revised Statutes of 1913, appeared to extend the jurisdiction of the county court in all counties having less than 50,000 inhabitants to "dependent, neglected and delinquent children," thus extending the legislation beyond its original import and creating a conflict of jurisdiction, the subject-matter quoted being included in "article" VII of the revision. Rev. St. 1913, ch. 16, art. VII, secs. 1263, 1264. The changes from the original enactments appeared in the compilation of 1922. Comp. St. 1922, sec. 1194. In this condition of the legislation, the legislature of 1925, under a title broad enough to cover jurisdiction of the county court over dependent, neglected and delinquent children, reenacted section 1194, Compiled Statutes of 1922, part of the "article" in which it was inserted, as already quoted from section 43-222, Compiled Statutes of 1929. Laws 1925, ch. 56.

The reenactment of 1925 conferred on the county court of Adams county the jurisdiction exercised in committing the minor to the Nebraska home for dependent children. It is the last expression of the legislative will on the subject

and its validity is not questioned in this proceeding. In view of the conclusion reached on the question of jurisdiction, the judgment of the district court is

AFFIRMED.

HOME OWNERS' LOAN CORPORATION, APPELLEE, V. EDITH IRENE SMITH ET AL., APPELLANTS.
283 N. W. 371

FILED JANUARY 13, 1939. No. 30459.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud." *Conservative Savings & Loan Ass'n v. Mancuso*, 134 Neb. 779, 279 N. W. 725.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Floyd E. Wright, for appellants.

William Morrow, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a suit in equity to foreclose a 7,175-dollar mortgage on lots 9 and 10, block 2, Shumway Place Addition to Scottsbluff. Home Owners' Loan Corporation, mortgagee, is plaintiff and Edith Irene Smith and Alvin C. Smith, her husband, mortgagors, are defendants. For defaults in payments, the district court decreed a foreclosure of the mortgage February 4, 1937, for an unpaid debt of $8,478.93. Under the decree the sheriff sold the mortgaged property March 7, 1938, to plaintiff for $9,089.75. Urging inadequacy of price, defendants objected to confirmation of the sheriff's sale. The objections were overruled and the sale confirmed. Defendants appealed.

The question for determination on appeal is adequacy of

the price for which the sheriff sold the property to plaintiff, defendants contending it was far below value. The trial court heard objections to confirmation on affidavits. Three affiants gave estimates of value respectively: $13,800; $14,000; $14,200. The estimates of four other affiants were respectively: $8,000; $8,400; $9,000; $9,000. There was no evidence that there would be a better bid at a resale, if ordered. There was no direct evidence of fraud. The sale price was not so low as to imply fraud or as to shock the conscience of the court. Following is the controlling rule:

"Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud." *Conservative Savings & Loan Ass'n v. Mancuso*, 134 Neb. 779, 279 N. W. 725.

The judgment below therefore will be affirmed, with permission of defendants, in district court, to redeem the mortgaged land from the foreclosure sale within 30 days from the filing of the mandate of the supreme court therein.

AFFIRMED.

ALBERT D. CHILEN, APPELLEE, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLANT.

283 N. W. 366

FILED JANUARY 13, 1939. No. 30450.

1. **Statutes**: CONSTRUCTION. "In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280.
2. ———: ———. "All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman*, 6 Neb. 516.
3. ———: ———. "In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." 59 C. J. 999.
4. **Workmen's Compensation**: APPEAL: DISMISSAL. From a considera-

tion of the terms of the Nebraska workmen's compensation act, and statutes *in pari materia*, it appears that where a civil action, equitable in nature, is established by statute, and jurisdiction to try the same *de novo* on appeal is vested in the district courts, such courts possess the power, upon motion of the plaintiff, to enter a dismissal of such action, then pending before them, without prejudice.

5. ———: AWARD: CONCLUSIVENESS. Under the terms of the Nebraska workmen's compensation act, then in force, the award of April 12, 1933, here in suit, had the force and effect of a judgment between the parties in interest. It was binding likewise on the insurance carrier and not subject to collateral attack.
6. Appeal. In the absence of a bill of exceptions, a ruling upon a motion, based upon evidence, will be presumed to be supported thereby.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

C. L. Clark and *H. A. Ronin*, for appellant.

J. W. Kinsinger, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an action by plaintiff upon an award of compensation against the defendant who was the insurance carrier for plaintiff's employer, Krause Cornice & Roofing Company, at the time plaintiff's injuries were sustained. The action seeks to enforce the insurance contract issued by this defendant, which contained the agreement of the insurer, that "it will promptly pay to the person entitled to same all benefits conferred by this act (the Nebraska workmen's compensation act), and all instalments of the compensation that may be awarded or agreed upon. * * * Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name." Trial to the district court, a jury being waived, resulted in a finding that plaintiff was entitled to have and recover "the forty weekly instalments of compensation awarded to plaintiff in the award entered

April 12, 1933, which are now unpaid and delinquent," and a judgment was entered therefor in the sum of $624.45, with interest, and costs, and attorney fees ultimately taxed at $200. From the order of the trial court overruling its motion for a new trial, defendant insurance company appeals.

The course of events preceding this judgment appealed from include the following, viz.: The plaintiff, an employee of the Krause Cornice & Roofing Company, suffered an accident on March 10, 1930, arising out of and in the course of his employment. In September, 1930, his employer filed a petition before the compensation commissioner of the state of Nebraska for the determination as to the amount of permanent disability of Chilen. This petition alleges that injuries suffered by plaintiff consisted of "a communite fracture of the right os calcis," and that at the time of his accident he was receiving $36 a week. The award made upon hearing of this petition was that Chilen was "temporarily totally disabled from and after the 10th day of March, 1930, and to and until the 16th day of July, 1930," and thereafter partially disabled until the 20th day of October, 1930; that Chilen has been paid compensation at the rate of $15 for each week during the period of temporary total disability and at the rate of $5 a week from and including the 16th day of July, 1930, to and including the 30th day of August, 1930, and that Chilen was entitled to seven weeks additional payments of compensation at $5 a week from August 30 to October 20, 1930, on account of temporary partial disability. There is a further finding that Chilen had sustained a partial permanent loss of use of his right foot to the extent of 20 per cent. thereof, for which he was awarded additional payments of $15 a week for a period of 30 weeks from and after the 20th day of October, 1930.

On September 4, 1931, plaintiff Chilen filed a second petition for compensation with the compensation commissioner of the state of Nebraska, based on the accident of March 10, 1930. In this pleading the Krause Cornice &

Roofing Company and the Commercial Casualty Insurance Company are named as defendants. It alleges in part: "Nature and extent of injury: Injury to both feet, including fracture of bones of right heel, injury to back and to lumbar vertebræ. Extent and nature of injury, except to right heel, unknown to claimant until August 20, 1931. Injury progressive, culminating in total disability about August 1, 1931."

Upon a hearing on this petition, at which evidence was introduced, on April 12, 1933, an award was entered and made by the chief deputy compensation commissioner whereby it was determined that plaintiff at the time of his injury was employed by G. C. Krause and W. A. Krause, doing business as Krause Cornice & Roofing Company, only, and it was further "ordered, adjudged, and decreed that plaintiff shall have and recover from the defendants, jointly and severally, compensation at the rate of $14.40 each week from and after the 27th day of February, 1933, for a period of 300 weeks, less the number of weeks for which plaintiff has been compensated for total disability, as and for a 60 per cent. partial permanent disability to plaintiff." This award was not appealed from.

Under the terms of the compensation act then in force, between the parties this order so entered is to be regarded as having the force and effect of a judgment except so far as expressly modified by the terms of the act itself. *Gray v. Burdin*, 125 Neb. 547, 250 N. W. 907.

In the construction of this order, however, it is to be noted that there is no allegation in this second petition, nor finding in the award thus entered thereon, that the Commercial Casualty Insurance Company was the insurance carrier of the Krause Cornice & Roofing Company when plaintiff's injuries were received. Against the insurance company no liability whatever is pleaded, nor in the award are there any findings of fact on which such liability may be based. The award refers to the insurance company, if at all, only in the use of the words "the defendants," without other description or designation. The insurance com-

pany was not a party to the first hearing of this cause, nor named in the award entered therein, nor is it a necessary party to the second award. Query: In this situation, can there be said to be a valid award against the insurance company entered on April 12, 1933, and has it any liability save and except the provisions of its bond in suit herein? *Sipple v. Haltom,* 86 Ind. App. 432, 158 N. E. 486; *Morsch v. Besack,* 52 Neb. 502, 72 N. W. 953; *Foster & Smith Lumber Co. v. Leisure,* 3 Neb. (Unof.) 237, 91 N. W. 556.

Still later, the record discloses that on September 30, 1936, Chilen filed in the workmen's compensation court of the state of Nebraska his petition against Krause Cornice & Roofing Company and the defendant insurance company, for "modification of award and for further compensation," based wholly on the injuries received by him in the accident of March 10, 1930, and set out at length their progressive development thus far. Plaintiff alleged therein that his disabilities have become, since the entry of the last award (April 12, 1933), and now are, total and permanent within the meaning of the workmen's compensation act of this state. The prayer of this petition is that the awards heretofore entered in his favor be modified as by statute provided, and that a further award be entered finding that plaintiff has become, and now is, totally and permanently disabled, etc. To this, the defendants named filed their joint answer, which, in addition to a general denial, and among other matters pleaded, expressly and specifically denied any increase of disability now suffered by the plaintiff as attributable to the injuries received by him in the accident of March 10, 1930; pleaded their full performance and payment of the conditions of the awards heretofore entered in plaintiff's favor; and prayed that plaintiff's petition for modification of award and for further compensation, filed September 30, 1936, be dismissed and that they go hence without day, but prayed for no affirmative relief. On May 10, 1937, after reception of evidence, and hearing on the merits before Frank M. Coffey, one of the

judges of the Nebraska compensation court, an order was entered sustaining the contentions of defendants and dismissing plaintiff's petition. On May 22, 1937, plaintiff filed in the compensation court in said cause his written waiver of rehearing in the above cause before the Nebraska workmen's compensation court, and of his election to appeal directly to the district court for Lancaster county, Nebraska. Thereupon, in the manner provided by law, such appeal was perfected and filed in the district court for Lancaster county, and issues joined therein by the parties thereto. On June 19, 1937, upon written motion of Chilen, this action and proceeding for modification and for further compensation instituted by plaintiff in the compensation court by petition filed September 30, 1936, now pending on appeal, was, by the district court for Lancaster county, Nebraska, dismissed without prejudice to any future action or proceeding by plaintiff for relief.

Under the terms of the insurance policy, first quoted herein, the theory of plaintiff set forth in his petition in the instant case is fully sustained, and his action properly instituted against the insurance carrier. It is, in effect, an action on the statutory bond executed by the insurance company.

Preliminary to the discussion of the specific assignments of error, it is to be noted that in the instant case there are presented injuries which are latent and progressive in character. As to such injuries, this court has announced the doctrine, viz.: "Where an employee is accidentally injured, and such injury is latent and of a progressive nature, and subsequently culminates in a compensatory disability, a claim for such injury under our employers' liability act may be filed with the compensation commissioner at any time within one year after the culmination thereof." *City of Hastings v. Saunders*, 114 Neb. 475, 208 N. W. 122. See, also, *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N. W. 457.

In the present case the effect of the accident of March 10, 1930, was to inflict on Chilen two independent, unconnected, and unrelated injuries,—an injured right foot which was discovered at once, and an injury to his back which was latent and progressive, and the existence of which was evidently unknown when the first award of compensation was made, and was not really discovered and determined until after the first award had been complied with. It is the last situation that we are exclusively concerned with in the instant proceeding.

Appellant contends that on the face of the record the order entered by the workmen's compensation court of May 10, 1937, has never been "reversed or modified upon appeal," and still remains "conclusive" on all parties to the litigation. This is founded on the provisions of section 48-174, Comp. St. Supp. 1937, which are, viz.: "4. * * * the court shall assign one of the judges of said court to hear the cause and make such findings, and such orders, awards or judgments as said court or judge is authorized by law to make, and such findings, orders, awards and judgments shall be signed by the judge before whom such proceedings were had. When proceedings are had before a judge of said court, his findings, orders, awards and judgments shall be conclusive upon all parties at interest unless reversed or modified upon appeal as hereinafter provided." In this connection appellant's contention is that a dismissal without prejudice entered in the district court on appeal is not a reversal or modification of this order contemplated by the terms of this enactment. The provisions quoted formed a part of section 13 of chapter 57 of the Session Laws of Nebraska for 1935. In consideration of the proposition here presented, we are committed to the view that, "In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280. See, also, *State v. City of Lincoln*, 68 Neb. 597, 94 N. W. 719; *Follmer v. Nuckolls County*, 6 Neb. 204. In addition, we have

adopted as a principle of statutory construction, the following: "All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman,* 6 Neb. 516. See, also, *State v. Babcock,* 21 Neb. 599, 33 N. W. 247; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979; *Downey v. Coykendall,* 81 Neb. 648, 116 N. W. 503.

With these principles in mind, we find in section 48-157, Comp. St. Supp. 1935, originally enacted as section 36 of chapter 57 of the Session Laws of Nebraska for 1935, the following, viz.: "Every order and award of the compensation court *shall be binding upon each party* at interest unless notice of intention to appeal to the district court has been filed with the compensation court within fourteen days following the date of rendition of the order or award: Provided, that the order or award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties." (Italics supplied.)

We appreciate the requirement that the two provisions last quoted are to be harmonized and each enforced if possible. But, if an irreconcilable conflict exists, the accepted rule in this jurisdiction is: "Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded." *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365. See, also, *Albertson v. State,* 9 Neb. 429, 2 N. W. 892; *Omaha Real Estate & Trust Co. v. Kragscow,* 47 Neb. 592, 66 N. W. 658.

"In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." 59 C. J. 999.

But the following also forms a part of section 48-174, Comp. St. Supp. 1937, as applicable after hearing and determination of a cause in the compensation court before a single judge or commissioner, viz.: "Provided, however,

that in any case the employer or the injured employee or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court of the county in which the accident occurred; * * * which court shall have the authority to hear and determine the cause as in equity, when the same *for all purposes* shall be tried as one in equity; and that said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial *de novo*." (Italics supplied.)

Our Civil Code provides: "Where, by general or special statute, a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this Code, the proceedings shall be conducted in conformity thereto. Where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceedings therein, such action shall be commenced and prosecuted in conformity to this Code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this Code and proceeded in accordingly." Comp. St. 1929, sec. 20-2226.

Here, by the terms of the compensation law, a civil action equitable in nature is established and jurisdiction to try the same *de novo* on appeal is vested in district courts. The statute designates the nature of the action in the district court and is silent as to procedure therein except to prescribe that it shall be a trial *de novo,* and as in equity. All of the provisions of our Civil Code are applicable and controlling, as they are in any other civil action equitable in nature. This includes the right of the plaintiff during the pendency of the proceeding to dismiss his action without

prejudice before final submission to the court. Comp. St. 1929, sec. 20-601.

Indeed, this seems to be the effect on the decree appealed from, apart from statute: "As to the force and effect of a judgment pending proceedings for review, aside from controlling influence of positive statute, this distinction is to be observed; where the proceeding is one in which the cause is retried as upon original process, the judgment is vacated, but if the proceeding is in the nature of an ancient writ of error, merely requiring a review of errors and an affirmance of the judgment, or a reversal and remanding for further trial, the judgment of the lower court is not vacated, but merely suspended. Hence, if a statutory remedy by appeal provides for a complete trial *de novo* in the appellate court, or it expressly so provides, the perfection of the proceeding usually operates to vacate the judgment of the court below." 4 C. J. S. sec. 611. See, also, *Stalbird v. Beattie*, 36 N. H. 455; *Fort v. Fort*, 118 Tenn. 103, 101 S. W. 433.

The conclusion, so far as express legislative intent is indicated, is in harmony with the form of the statute here involved. The right of direct appeal to the district court, as provided in our compensation act, is embraced in a proviso, of which the language first quoted above, upon which appellee relies, constitutes no part. The accepted rule of construction is: "A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it." 59 C. J. 1087. Therefore, a proviso prescribing a trial *de novo* in equity, and thus necessarily implying the right of dismissal without prejudice *pendente lite*, as an exception to the statute, would manifestly be controlling as here applied. *Ford v. Boyd County*, 111 Neb. 834, 197 N. W. 953.

It follows that the dismissal without prejudice entered in the district court for Lancaster county on motion of the plaintiff was proper and did not operate to reinstate the order or award appealed from, and that the award of April

12, 1933, so far as unperformed, remains in full force and effect. *Eden Musee Co. v. Yohe,* 37 Neb. 452, 55 N. W. 866; *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.,* 102 Neb. 455, 167 N. W. 731; *Blue River Power Co. v. Hronik,* 116 Neb. 405, 217 N. W. 604.

On the merits of the present action, defendant claims the award upon which plaintiff's present action is based is erroneous and excessive, in that appellant was not credited with the payments for partial disability made prior to the entry of the award here in suit. Whether payment made of partial temporary disability occasioned by the injured foot before the latent injuries in the back had been discovered are required to be credited on an award for permanent disability of the latter is certainly, under the facts in this case, a serious question which we are not called upon to determine. The terms of the award here in suit embraced a period of 300 weeks, less the number of weeks for which plaintiff had been compensated for total disability as and for 60 per cent. permanent disability. It is not questioned that the district court gave due credit as required and limited by the express terms of this award in suit. After such credit had been given there remained 40 payments of $14.40 each unpaid, for which judgment was rendered. Appellant's claims of error all arise prior to the entry of the award and existed when it was made. Under the terms of the statute, the award here in suit had the force and effect of a judgment between the parties in interest. *Gray v. Burdin,* 125 Neb. 547, 250 N. W. 907; Comp. St. 1929, sec. 48-157. It is expressly by statute made binding upon the insurance carrier and may not be by it collaterally assailed. Comp. St. Supp. 1937, sec. 48-147; *Beadle v. Harmon,* 130 Neb. 389, 265 N. W. 18; *Heald v. Polk County,* 46 Neb. 28, 64 N. W. 376.

As to plaintiff's claim that the order of the district court retaxing the attorney fees and allowing the same in the sum of $200 constituted an excessive allowance, the transcript discloses that evidence was submitted to the trial court at this hearing, which is not embodied in the bill of

exceptions as allowed and settled by that court. Under these circumstances, the question of fact involved is not for our consideration. "In the absence of a bill of exceptions, a finding of fact, or ruling upon a motion, based upon evidence, will be presumed to be supported thereby." *Travelers Ins. Co. v. Sawicki,* 122 Neb. 108, 239 N. W. 726. See, also, *State v. State Bank of Ravenna,* 127 Neb. 338, 255 N. W. 549.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

KANSAS CITY LIFE INSURANCE COMPANY, APPELLEE, V. CHARLES NEVERVE ET AL: GROTSIE NEVERVE, APPELLANT.
283 N. W. 378

FILED JANUARY 13, 1939. No. 30465.

Appeal: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Appeal dismissed.*

Charles M. Bosley, for appellant.

E. H. Evans, Urban Simon and *Francis V. Robinson, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is an appeal from an order confirming a sale of certain premises made pursuant to a mortgage foreclosure, which order was entered on March 21, 1938. Two questions are presented, viz.: (1) A motion filed by appellee, and noticed for hearing on December 5, 1938, for a dismissal

of the appeal for lack of necessary parties in this court; and (2) the alleged error of the trial court in overruling defendant Grotsie Neverve's motion to vacate the public sale had because of insufficiency of purchase price.

The decree of foreclosure was entered on March 23, 1936, adjudging the lien of the Kansas City Life Insurance Company, a corporation, which lien included taxes assessed against the premises paid by it as mortgagee for the years 1929 to 1932, both inclusive, to be a first and senior lien; that the mechanic's lien pleaded by the Cowles-White Lumber Company was a second lien on the mortgaged premises, but further determined that such lumber company lien "was concurrent" with mechanics' liens foreclosed on parts of said premises in favor of Oscar Jenkins and also Smiley Dawson. Personal service of summons appears to have been made upon the defendants Charles Neverve and Grotsie Neverve in the district court, and the foregoing decree finds that they, together with their wives, jointly executed and delivered certain of the notes and real estate mortgages securing the same, in suit in this proceeding, and each of the defendants last named were, by the express terms of the decree, "given exceptions" thereto.

On November 13, 1937, an order of sale was issued on the decree of foreclosure to satisfy the same in favor of Kansas City Life Insurance Company, Cowles-White Lumber Company, a corporation, Oscar Jenkins, and Smiley Dawson. The public sale was had on the 20th day of December, 1937, and the mortgaged premises sold to the Cowles-White Lumber Company, defendant and cross-petitioner, for the sum of $14,400. The amount due on the decree at the time of sale was $17,063.52 and $214.31 costs of suit. The defendant Grotsie Neverve alone filed objections to this sale, and he alone introduced evidence to support the objections thus tendered. At the close of this proceeding, the court confirmed the sale. The decree of confirmation in terms recites: "To all of which said findings in order defendant (Grotsie Neverve) excepts and gives notice of intention to appeal in open court." The only

statutory provision for notice of appeal to be given in the district court is the following: "It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within ninety days after the rendition thereof, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, but if such notice is not given, the supreme court may provide by rule for notice after the appeal is lodged in that court." Comp. St. 1929, sec. 20-1914. The transcript on appeal, which contains no such "notice of intention" whatever as contemplated by such statute, was filed in this court on June 16, 1938. On the same day the appellant filed his præcipe in this court, which states, in part, "that Grotsie Neverve is the only party appealing, and that the Kansas City Life Insurance Company, a corporation, is the appellee herein." Accordingly, the appellant on the 16th day of June, 1938, also caused a "notice of appeal" to issue from this court, directed to, and to be served upon, the Kansas City Life Insurance Company only, as sole appellee. The record contains a bill of exceptions purporting to contain all the evidence offered and given by each of the parties, etc. The record further discloses that the proposed bill of exceptions, previous to its allowance and settlement by the trial judge, had been served upon the attorney for the Kansas City Life Insurance Company only. It is obvious that this bill is not binding upon any one save the party served, and upon proper motion filed by parties to the cause not served will be suppressed. *Fitzgerald v. Brandt,* 36 Neb. 683, 54 N. W. 992. The record also discloses that appellant's brief in this court was served upon the Kansas City Life Insurance Company only. The effect of the appellate proceeding, if successful, will be to set aside and annul the sale had in which all parties to the proceeding have a direct financial interest and will be substantially affected by the disposition of the case made in this court. On December 1, 1938, and before this cause was reached in this court for submission on the merits,

the Kansas City Life Insurance Company filed its motion to dismiss the appeal because of lack of necessary parties, it appearing from the transcript that Cowles-White Lumber Company, although a defendant and cross-petitioner in the proceedings in the district court and a purchaser of the premises at the judicial sale, the confirmation of which was appealed from, had not been, by appellant, made a party on appeal. This motion to dismiss had been duly noticed for hearing on December 5, 1938, at the hour of 9 o'clock a. m., at the then sitting of the court, and for convenience of counsel, and of this court, was argued and submitted December 8, 1938, on the same day the case was argued on the merits.

We are committed to the view that the purchaser at a judicial sale, by reason of his purchase alone, becomes a party to the proceedings on appeal, and is entitled to enforce the rights secured by his purchase. *State v. Denton State Bank,* 126 Neb. 486, 253 N. W. 670; *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.,* 51 Neb. 659, 71 N. W. 279; *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164.

We have long been committed to this rule, viz.: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223, 193 N. W. 267. See, also, *Donisthorpe v. Vavra,* 134 Neb. 157, 278 N. W. 151; *Bliss v. Farmers Grain & Stock Co.,* 127 Neb. 147, 254 N. W. 725; *Castek v. Tully,* 127 Neb. 657, 256 N. W. 506; *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

This is not a mere technical rule. An eminent text-writer has well said, viz.: "The rule requiring parties having an interest that may be materially affected by the judgment to be brought before the appellate tribunal is in no sense a technical one; on the contrary, it is a rule of great importance and is required in order to secure a litigant 'his day in court.' It is, when justly understood, a salutary

rule, and one required by the constitutional principle that the rights of a party cannot be adjudicated without notice. The right of a party to notice is, indeed, fundamental, for without notice it cannot be truly said that there is due process of law." Elliott, Appellate Procedure, sec. 143.

In *Castek v. Tully,* 127 Neb. 657, 256 N. W. 506, this court announced the rule, viz.: "The failure to have all the affected parties before the appellate court may alone be sufficient to prevent a determination of the issues raised by appeal." And, likewise, this rule, in effect, was applied by this court, on its own motion, in *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

The facts hereinbefore recited, suggesting the manifest inability of this court to administer any relief without substantially affecting the rights of necessary parties not now before it, would apparently impose on this tribunal the duty of applying the principle announced in the cases last above cited. In view of the motion presented by appellee, the adoption of this course may not be necessary and we may not be required to decide the question suggested.

The appellant contends that the lack of necessary parties has been waived by appellee in not seasonably objecting thereto. This doctrine of waiver must be considered in the light of the obvious fact that, in legal proceedings, one party cannot by consent, actual or implied, confer jurisdiction over some other person. A person by waiver may of course confer authority over himself and his own rights, but he cannot confer authority over another person or his rights.

The appellant cites but two cases to sustain his contention, viz.: *Olsen v. Marquis,* 88 Neb. 610, 130 N. W. 267, and *Bates-Smith Investment Co. v. Scott,* 56 Neb. 475, 76 N. W. 1063.

From the *Olsen* case we quote: "There is nothing in the transcript to advise us whether W. P. Marquis answered in the district court; notice of appeal was not served upon him, and he has not appeared in this court. The plaintiff argues that there is a defect of parties and that we should

not consider the case upon its merits. The objection is not otherwise presented than by an argument in the brief, and was not brought to our attention until John A. Marquis had submitted the case upon the merits. Upon the authority of *Bates-Smith Investment Co. v. Scott*, 56 Neb. 475, the objection will be held to have been presented too late for consideration." And, in the first paragraph of the syllabus in the *Olsen* case, we find the following: "A nonjoinder of parties in an appeal to this court will be waived by not objecting until the case is submitted upon the merits."

In the *Bates-Smith Investment Company* case we quote from the opinion, where, after discussing the rule as to the presence of all necessary parties on appeal, the opinion states: "But it has also been held that such defect is waived if the objection is not made before the submission of the cause on its merits. In the case at bar no motion has been made for the dismissal of the proceedings on the ground of defect of parties. The first mention of it appears in the brief for defendant in error on the merits, and is too late to be of any avail. The defect of parties, if any, must be treated as waived." The rule is announced in the first paragraphs of the syllabus of this *Bates-Smith* case, in the following form: "All parties to a joint judgment must be joined in error proceedings therefrom, and a nonjoinder is a fatal defect in the proceedings; but if the objection is delayed until the final submission of the cause on its merits, the defect is waived."

In *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104, not cited by appellant, the rule of "waiver" is stated as follows: "Where the cause is submitted to this court on its merits, and no objection is interposed that there is a defect of parties until after such submission, it will be taken to constitute a waiver of the absence of proper parties."

On the other hand, in *Farney v. Hamilton County*, 54 Neb. 797, 75 N. W. 44, Norval, J., says: "It is also insisted that the county has waived its right to object to a hearing on the merits by accepting service of the briefs of the

opposing party without then raising the point that there was a defect of parties. The doctrine has been more than once asserted that the submission of a cause on the merits in the appellate court, without objection that all the parties to a joint judgment had not been brought in by the petition in error, is a waiver of such defect. *Consaul v. Sheldon,* 35 Neb. 247; *Curtin v. Atkinson,* 36 Neb. 110. But in no case has this court held that the acceptance of service of briefs is a waiver of a defect of parties. It certainly could not have that effect. A defendant to a petition in error has the right to insist, on his first appearance in the appellate court, *before the final submission is there taken on the merits of the cause,* that all parties interested in either sustaining or reversing the judgment brought up for review must be made parties to the error proceeding, either as plaintiff or defendants." (Italics supplied.)

In the instant case the motion to dismiss was filed on December 1, 1938, and under rules of the court it was for presentation before the submission of the cause on the merits. The fact that, for the convenience of the court, the submission of both the motion and the cause on the merits were taken at the same sitting may not impair the rights of the litigants, it plainly appearing that the question of the absence of necessary parties was raised by the appellee prior to the final submission of the cause on the merits.

It follows that the motion to dismiss must be sustained. This necessarily prevents the consideration of the appeal on the merits.

APPEAL DISMISSED.

CITY OF SCOTTSBLUFF, APPELLEE, V. JAMES W. ACTON, APPELLANT: PIONEER REALTY & INVESTMENT COMPANY ET AL., APPELLEES.

283 N. W. 374

FILED JANUARY 13, 1939. No. 30448.

1. **Municipal Corporations: SEWERS: SPECIAL ASSESSMENTS. Section**

16-651, Comp. St. 1929, provides in part: "Special taxes may be levied by the mayor and council for the purpose of paying the cost of constructing sewers or drains within the city, such tax to be levied on the real estate lying and being within the sewerage district in which such sewers or drains may be situated to the extent of benefits to such property by reason of such improvement."

2. ———: ———: ———. "All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district." *McCaffrey v. City of Omaha*, 91 Neb. 184, 135 N. W. 552.

3. ———: ———: ———. Where a city properly levies a special assessment against certain real estate and tax sale certificates are foreclosed to collect the special and general assessments against an entire tract of land, the greater portion of which is not benefited by the special assessment, and a judgment in foreclosure is entered against the owner, and the real estate ordered sold; *held*, decree of foreclosure thereon is subject to collateral attack, and the tax sale certificates foreclosed and judgment in foreclosure thereon are void proceedings.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed and dismissed.*

Morrow & Morrow, for appellant.

Floyd E. Wright and *Straight Townsend, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an action to foreclose a tax sale certificate, issued by the county treasurer of Scotts Bluff county to the county of Scotts Bluff, duly assigned to the city of Scottsbluff, on tax lot 12, in section 23, township 22 north, range 55 west of the 6th P. M. Tax lot 12 contains approximately 17 acres and is a triangular piece of land abutting on the right of way of the Chicago, Burlington & Quincy Railway Company. The city of Scottsbluff laid a sewer along the south side of this tract of land and levied a special assessment against the south 150 feet of the same, comprising three to four acres, to pay the cost of construction

of the sewer. The county treasurer issued a tax sale certificate covering the entire tax lot 12, which included the land against which no special assessment was levied, and which was a greater portion of lot 12 than the land against which the assessment was levied.

On March 3, 1937, plaintiff filed a petition in foreclosure against lot 12 on a tax sale certificate for general taxes and special assessments, setting forth the amount due as $3,035.41, and praying for foreclosure of the tax sale certificate and sale of the real estate, and for attorneys' fees and costs. Defendant Acton (appellant here) did not plead nor answer. On May 1, 1937, a default judgment was entered against defendant. No appeal was taken from this judgment. On July 12, 1937, prior to the sale of the land, defendant filed a petition in the district court in the same cause of action, alleging ownership of lot 12, and asking that the court divide the amount of the decree, setting forth the amount to be paid to redeem that part of lot 12 not within the sewer district, and against which the city of Scottsbluff had not levied a special assessment for improvements; that at the request of defendant, the county assessor had undertaken to divide, and had divided, taxes on lot 12, setting forth the amount to be paid to redeem that portion of lot 12 sought to be redeemed. On July 14, 1937, objections to the application of defendant for permission to redeem were filed in the district court by plaintiff, setting forth that the county assessor made no division of the tax levied against lot 12; that the division of the tax, alleged to have been made by the county assessor, was an unfair division, and that the county assessor was without authority to make a division of the tax; that lot 12 had never been divided, but was one lot and taxed as such; that after a decree is entered in a tax foreclosure suit there can be no partial distribution. The real estate was sold. Objections to confirmation, containing the same subject-matter as in the petition of defendant, were filed July 16, 1937; the sale was set aside and a new sale ordered, and objections to confirmation of the second sale

were filed by the defendant, containing the same subject-matter as in previous pleading. A journal entry by the court on March 7, 1938, among other findings, found that the question as to the validity of the tax sale certificate, issued by the county treasurer of Scotts Bluff county, had already been adjudicated and the certificate found to be valid by order of the court, entered in this action on July 27, 1937.

In the case before us we are concerned with the question whether or not the blanket tax sale certificate, issued by the county treasurer against tax lot 12, against a portion of which special assessments were levied by the city of Scottsbluff, is void, and, if void, did the district court have jurisdiction to enter a decree ordering said entire tax lot 12 to be sold to satisfy special assessments levied against a part thereof?

Section 16-651, Comp. St. 1929, reads in part: "Special taxes may be levied by the mayor and council for the purpose of paying the cost of constructing sewers or drains within the city, such tax to be levied on the real estate lying and being within the sewerage district in which such sewers or drains may be situated to the extent of benefits to such property by reason of such improvement."

In *McCaffrey v. City of Omaha,* 91 Neb. 184, 135 N. W. 552, this court held: "All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district."

"The only foundation for special assessments rests in the special benefits conferred upon the property assessed." *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734.

In the case of *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N. W. 739, it was held that special assessments could only be levied on property specially benefited, and only to the extent of the benefits. And in *Cain v. City of Omaha,* 42 Neb. 120, 60 N. W. 368, it was held: "The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay

which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal." In the opinion the case of *Hanscom v. City of Omaha, supra,* was cited.

This court is committed to the rule that all levies for special assessments must be made within the improvement district to the extent of the benefits to such property by reason of the improvement. The city of Scottsbluff properly levied the special assessments as shown by the ordinances.

The appellant cites section 77-2045, Comp. St. 1929, which in part reads: "No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land," and *Taylor v. Evans,* 106 Neb. 233, 183 N. W. 89, in which one Evans commenced a suit to foreclose tax liens, setting up each of the tax certificates as a separate lien upon the particular tract covered thereby. The owner of the land was made a defendant; he made no appearance, and a default decree was entered by the court against the owner. He failed to pay the amount of the lien as adjudged by the court against the owner. The clerk of the court combined the two amounts due upon both liens and directed the sheriff to sell both tracts for the aggregate sum, instead of keeping the two liens and the two tracts separate and distinct.

The owner of the land filed no objections to the sale, the sale was confirmed and deed ordered to the purchaser. Subsequently, the owner of the land commenced an action to cancel the deed and all proceedings leading up to it, and to be adjudged the right to redeem. Relief was granted him in the court below, and the sale was declared void. The decree was in conformity with the statute (Rev. St. 1913, sec. 6565, now Comp. St. 1929, sec. 77-2045). The violation by the sheriff of the terms of the decree undoubtedly would have entitled the owner to an order setting aside the sale, if he had filed timely objection before confirmation. The question was whether or not the action of the sheriff was a mere irregularity, which would be cured by confirmation, or was a mode of sale adopted by the

sheriff, in which the court was without jurisdiction either to order in the first instance, or afterwards, by confirmation, to ratify and approve. In the body of the opinion we find this language (p. 235): "If it was clearly beyond the limits of the court's jurisdiction, a sale of the two tracts for the combined amount of the liens would be void, and, therefore, subject to collateral attack. The court could not, by confirmation, make valid a procedure which it could not in the first instance have ordered." And at page 237 the opinion stated: "We can see no distinction between a case wherein two or more separate tax liens upon distinct tracts are involved and a case in which two or more separate mortgages upon distinct tracts owned by the same person are sought to be foreclosed. In the latter case it has been held that a sale of the tracts together for a gross sum is unauthorized and void, and will be set aside in a collateral suit. *Hull v. King*, 38 Minn. 349. * * * The district court was, in our opinion, without jurisdiction to order or by confirmation to approve a sale so conducted; it was void and therefore open to collateral attack."

The case of *Taylor v. Evans, supra,* is authority for the proposition that, where a sale is void and conducted in violation of the decree of the court, such sale is subject to collateral attack by an independent action, or at any time by proper objections to confirmation. Where the tax sale certificate disclosed special assessments against a part of real estate not subject thereto, the defendant, under the decision in *Taylor v. Evans, supra,* could, by collateral attack, raise the issue at any time during the proceeding.

Plaintiff cites *School District D v. School District No. 80*, 112 Neb. 867, 201 N. W. 964, wherein this court held:

"A party to a lawsuit in the district court, where such court has jurisdiction over the person and subject-matter, will be bound by the judgment rendered in such case when collaterally attacking it, even though such judgment was irregularly or erroneously entered.

"If the trial court properly acquires jurisdiction, 'it has the right to decide every question which arises in the case,

and its orders and judgments, however erroneous, cannot be collaterally assailed. Such errors can only be taken advantage of by the proceedings in error or appeal to this court.' *Fraaman v. Fraaman*, 64 Neb. 472.

"A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose."

A careful reading of the above case discloses a clear distinction between it and the case at bar. The school district case involves a section of the statute providing for redistricting school districts. There is nothing to disclose that this section of the statute was void. In the instant case, the tax sale certificates, upon which the foreclosure decree was entered, are void.

The case of *Schobert-Zimmerman Drainage District v. Soll*, 132 Neb. 629, 272 N. W. 775, is cited by plaintiff, relative to special assessments had on two pieces of land owned by the same party and sold together on a tax sale certificate. The tracts were contiguous, and what the court did was to find the amount due against each tract of land separately, and if the sale of one was sufficient to take care of the amount due against both tracts, the surplus from the sale of one tract was to be applied in payment of the amount due against the other. The case is not analogous to the situation in the case at bar.

The tax sale certificates in this action are void. They cover real estate outside of the created sewer district and do burden all of lot 12 with the payment of special assessments, when, in fact, the greater portion of lot 12 is exempt therefrom. The district court was without jurisdiction to enter a decree of foreclosure on a void tax sale certificate.

In 61 C. J. 1127, it is stated: "The decisions generally recognize the following fundamental rules: (1) That a tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold. (2) That in the absence of a statute to the contrary each

parcel of a person's land separately assessed is liable to sale only for its own specific tax. (3) That where land is sold to pay the taxes due upon it, together with the taxes due upon other lands, whether such lands belong to the same or a different owner the sale is invalid."

Reference is here made to section 77-1602, Comp. St. 1929, relating to assessment books, how made by the county clerk, which is authority for the proper county official to segregate the special assessments in the instant case on the assessment books, as provided. Reference is also here made to section 77-1006, Comp. St. 1929.

For the reasons herein given, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

WALTER WOLSKI, APPELLANT, V. NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, APPELLEE.
283 N. W. 381

FILED JANUARY 13, 1939. No. 30466.

1. Insurance: POLICY: DEFAULT: REINSTATEMENT. Where industrial life insurance policy contains a clause that the policy shall be incontestable after the policy has been in force during the lifetime of the insured two full years from date thereof, except for nonpayment of premiums, or fraud, parties intend that there shall be a similar period to contest reinstatement, beginning when reinstatement occurs, instead of at date of policy.
2. ———: ———: ———: ———. A provision in an application for revival of an industrial life insurance policy that the applicant certifies that "I am now in good health, that I am suffering from no disease, either acute or chronic," means that good health is necessary to warrant reinstatement, and it is a condition precedent without which there is no liability on the policy.
3. ———: ———: ———: ———: PRESUMPTION. Where industrial life insurance policies are indorsed for reinstatement, premiums in arrears accepted, and subsequent premiums collected, the presumption is that the policies are valid, subsisting contracts, and that the insured is in good health. However, where the insurer proves that at the time insured

sought to reinstate the policies by making revival applications the insured was not in good health, and, in addition thereto, proves a tender of the paid-up life insurance, as evidenced by the policies, from date of lapse, and all premiums collected from date of lapse of the policies, and refusal to accept further premiums as soon as insurer obtained knowledge of the nature of insured's illness, as being such as to have antedated his reinstatement, then the presumption is rebutted.

4. ———: ———: ———: ———. Where an insurance company accepts delinquent premiums on lapsed policies and reinstates, without an application for revival, on a previous occasion, such action does not establish such a course of dealing or custom as would estop the company from asserting that the applicant for reinstatement was not in good health at the time he sought to revive the policies.
5. Witnesses: PRIVILEGED COMMUNICATIONS: WAIVER. Where industrial life insurance policy provides: "The company shall have the right at its option to make such investigation into matters upon which any claim may be based or the subject thereof as it may deem necessary in order to determine its liability hereunder," such provision constitutes a waiver by the insured of a privileged communication, within the meaning of section 20-1207, Comp. St. 1929, and such waiver is valid and binding upon those claiming any interest in the policy.
6. ———: ———: ———. A provision in an industrial life insurance policy which reads: "Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to" the physicians, constitutes a waiver by the insured of a privileged communication, within the meaning of section 20-1207, Comp. St. 1929, and such waiver is valid and binding upon those claiming any interest in the policy.
7. Evidence. "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable." *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Friedman & Higgins, for appellant.

King & Haggart, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

This is an action brought by the beneficiary on two industrial insurance policies of the face value of $740 and $96, respectively, issued by the defendant company to Paul Wolski October 6, 1930. The premiums were paid on the policies until December 21, 1936, at which time the weekly premiums became delinquent. An agent of the company usually called at the insured's home weekly to collect the premiums, but did not call after said date. February 23, 1937, the insured paid premiums in arrears and signed applications to revive the policies. Other evidence will be discussed in the opinion. At the conclusion of all the testimony, on motion made by defendant, the trial judge directed a verdict for the defendant, and from this ruling the plaintiff appeals.

Plaintiff contends that the incontestable clause in the policies applies as well on a reinstatement as on the original issuance of the policies, and that the policies are incontestable except for fraud, or nonpayment of premiums. We have under consideration applications for revival of the two policies, and with reference to the incontestable clauses appearing in the policies, and the effect of such clauses in favor of the insured and the rights of the insurer thereunder, the following pertinent authorities are applicable:

In the case of *Lanier v. New York Life Ins. Co.*, 88 Fed. (2d) 196, it was held:

"Reinstatement of life policy, under agreement to present satisfactory evidence of insurability at home office and to pay overdue premiums with interest, was not automatic but required meeting of the minds, and to that extent had elements of a new contract, but old contract went back into force with premium rates and dates and general provisions unchanged, and, pursuant to promise in policy, default was wiped out as though it had not occurred. * * *

"Where life policy contains clause that policy shall be incontestable after two years from its date of issue except for nonpayment of premium, parties intend that there shall be a similar period to contest reinstatement, beginning

when reinstatement occurs instead of at date of issue of policy." See *State Life Ins. Co. v. Spencer,* 62 Fed. (2d) 640; *Pacific Mutual Life Ins. Co. v. Galbraith,* 115 Tenn. 471, 91 S. W. 204; *Teeter v. United Life Ins. Ass'n,* 159 N. Y. 411, 54 N. E. 72.

When the insured signed the applications for revival of the two policies, the old contracts were void, and if revived, as provided for by complying with the conditions for reinstatement, the heretofore existing insurance contracts, with all of their provisions, would again come into being.

Plaintiff further contends that the courts of Nebraska, by statute and precedent, are committed to the view that the language in the applications, in the medical examinations and in the policies upon which the defendant relies amount to no more than representations and do not constitute warranties, citing *Pollard v. Royal Highlanders,* 128 Neb. 790, 260 N. W. 399. The defense in that case was based upon statements made in the application for reinstatement upon which the company relied, and was not predicated upon a condition precedent. The policies in the instant case, among other things, provide that "there shall be no liability whatever under this contract for any disability or death resulting from an accident occurring or illness contracted or commencing prior to the date of the revival indorsement hereon as aforesaid."

It will be noted that the policies specifically provide that there shall be no liability if the applicant is not then in good health, and no medical examination by or certificate from a physician is required. The premiums on the two policies lapsed December 21, 1936, for a period of nine weeks. On February 23, 1937, the insured, calling at the office of the defendant, signed two applications for revival of the two policies. Each application contained the following provision:

"I hereby declare that I am the person who was formerly insured under the above named policy, and that having allowed it to become lapsed, I wish to revive it. I certify

that I am now in good health, that I am suffering from no disease, either acute or chronic, nor from the result of any accident or injury. * * * I ask a revival of my policy with the understanding that it will not be in force (although I now pay arrears) until the company shall have approved this application and evidenced same by indorsement on my policy, and that my policy, if revived, will only be in such benefit as provided by the rules of the company."

The reinstatements of the policies were indorsed thereon March 8, 1937. At the time that the applications for revival were entered into and the indorsements made on the policies, the insured was suffering from a serious disease, a cancer. The testimony of the operating surgeon is positive and absolute that the condition had existed for 8 months prior to the operation, or more, probably from 12 to 14 months. Therefore, the insured was not in sound health at the time he signed the applications for revival of the policies. The condition required by the company in reviving policies, requiring good health on the part of the insured, is, in no sense, unreasonable.

In the case of *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624, this court held: "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy." In the above case an action was brought on an industrial policy. In the body of the opinion we find this language (p. 749): "Where a policy of life insurance provides that it shall not take effect if on the date thereof the insured be not in sound health, but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums,"—citing *Metropolitan Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219. In the instant case, the defendant tendered the paid-up insurance, as evidenced by the policies, at the time they lapsed, plus all premiums paid for reinstatement and subsequent thereto.

In the case of *Van Dahl v. Sovereign Camp, W. O. W.*,

130 Neb. 181, 264 N. W. 454, an action was brought against a fraternal benefit association, where the constitution and by-laws of the association provided that a member, suspended for nonpayment of assessments, may, within three months from the date of his suspension, again become a member by paying all delinquent premiums to date, and that such payments will be held as a warranty that he was in good health and would remain so for 30 days thereafter; that there is no liability on the part of the association where it appears from the evidence that the holder of the certificate died within 30 days from the payment of the delinquent assessments. In the body of the opinion *Pickens v. Security Benefit Ass'n,* 117 Kan. 475, 231 Pac. 1016, was cited, in which case, in discussing by-laws of a fraternal beneficiary society, permitting reinstatement, providing the member was in good health, constituted a warranty of good health, it was "*held,* good health in fact was required, and the requirement was not satisfied by appearance of good health or reasonable belief that the member was in good health." *Pickens v. Security Benefit Ass'n, supra,* first paragraph of syllabus.

In the case of *Supreme Lodge v. Grijalva,* 28 Ariz. 77, 235 Pac. 397, also cited and quoted from in the *Van Dahl* case, it was said (p. 84): "The warranty of good health, and actual good health on the part of the insured, are expressly made conditions precedent to the reinstatement of the already automatically forfeited certificate in this case." See *Richards v. Maine Benefit Ass'n,* 85 Me. 99, 26 Atl. 1050.

We have further expression by this court, where an industrial policy was involved, as in the instant case, in *Hinnenkamp v. Metropolitan Life Ins. Co.,* 134 Neb. 846, 279 N. W. 784, wherein this court quoted from the case of *Weddle v. Prudential Ins. Co., supra,* holding: "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy."

This court recognizes and enforces a condition precedent, which is separate and distinct from the general rule with respect to representations of fact, where the defense is based upon fraud. In the *Hinnenkamp* case, none of the medical men testified that the insured had a cancer in September or October, 1935, or expressed their opinion to that effect. The company's physician gave the insured a superficial examination at the time that he applied for the policy. This physician was called as a witness for the defense and testified that, in his opinion, the insured was of unsound health at the date of the application and delivery of the policy. He had passed the insured by his examination of him. This presented a controverted issue of fact on the question of sound health, and this controverted question of fact developed on the testimony of the defendant company's own witnesses. In the instant case the evidence of Doctor Best is not controverted. After an extensive operation he removed the cancer and stated he would say that the cancer was at least 8 months old, and probably closer to 12 or 14 months. There is no controverted question. The insured was not in sound health at the time he signed the applications for revival of the policies. He did not meet the condition precedent. The *Hinnenkamp* case is distinguished from the case at bar.

Plaintiff contends that the indorsement of March 8, 1937, on the policies, in conformity with the revival applications, and the acceptance of subsequent premiums reinstated the policies and raised a presumption that the insured was in sound health and that the policies were valid and subsisting contracts, citing *Ruggiro v. Prudential Ins. Co.*, 113 N. J. Law, 561, 174 Atl. 882; *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Weddle v. Prudential Ins. Co., supra.* This presumption is sufficient to sustain the burden of proof resting upon the plaintiff until the insurer introduces evidence to rebut it. *Weddle v. Prudential Ins. Co., supra*; 1 Cooley, Briefs on Insurance (2d ed.) 668; *Ruggiro v. Prudential Ins. Co., supra.* In the instant case the evidence of insurer did rebut the presumption.

Plaintiff further contends that the company is now estopped to insist upon its defense of a condition precedent, or to assert that the insured was not in sound health at the time of signing the revival applications; that such condition is waived by collection of the premiums after knowledge by the agent of the company of the illness of the insured, and that the agent recommended the reinstatement of the policies, as shown by the revival applications. Plaintiff cites 37 C. J. 405, which reads: "A waiver of, or estoppel to insist upon, a provision of the policy that no obligation is assumed by the company unless the insured is in sound health on the date of the policy may arise from a delivery of the policy or collection of premiums by an authorized agent possessing knowledge of the illness or unsound health of insured on the date of the policy."

Under the foregoing contention the defendant company would waive the nonliability provision by collecting premiums from February 22, 1937, to April 12, 1937. The defendant claims that it obtained its first knowledge of the illness of the insured on March 26, 1937, when claim blanks were received by it for weekly disability. The insured's niece testified that she went to the company's local office about a week after March 1 and reported the insured as ill; that he became ill February 28, 1937. The record is void of evidence that the company, through or by its agents, knew, until April 12, 1937, when a report was made to the company, the nature or extent of the insured's illness as being such as to have antedated his reinstatement. The applications for revival contemplated payment of premiums in arrears and continued payment of premiums to keep policies in force. The evidence is insufficient to charge the defendant with knowledge.

In *Supreme Lodge v. Grijalva, supra,* cited in *Van Dahl v. Sovereign Camp, W. O. W., supra,* the Arizona court said (p. 85): "The doctrine of waiver is based on knowledge, and unless the statute clearly requires it, we should not hold that acceptance of past-due assessments on an insurance certificate which has automatically lapsed waives,

not only what the insurer already knows, to wit, that the payment is overdue, but also through *ex post facto* action (for that is the only way such result can be produced) reinstates the lapsed policy by a compulsory waiver of the very thing expressly stipulated as essential to reinstatement, and which the insured has agreed he warrants by the very offer of his money, and without which warranty it could not, and would not, have been accepted."

In the instant case there is evidence that the original policies had lapsed for nonpayment of premiums and were reinstated without an application for revival having been signed, and reinstatement was made on the books of the company. The one instance occurred on July 26, 1930, when six premiums in arrears were collected.

In *Koehler v. Modern Brotherhood of America,* 160 Mich. 180, 125 N. W. 49, cited in *Van Dahl v. Sovereign Camp, W. O. W., supra,* in speaking of proof of a custom of accepting delinquent premiums, the Michigan court stated that "this liberality should not be given the effect of waiving in advance subsequent delinquencies, thereby, in effect, abrogating the provisions of the contract and practically making a new one."

In the instant case the policies further provide that the failure of the collector to call for the premium will not be an excuse for nonpayment, as the insured will then be required to pay the premium at a branch office of the company, or remit the same direct to the home office. Under the evidence in this case, a finding of waiver or estoppel is not warranted.

Plaintiff objected to the testimony of Doctor Russell Best, the attending physician of the insured, as privileged. Section 20-1206, Comp. St. 1929, provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of

practice or discipline." Section 20-1207, Comp. St. 1929, provides: "The prohibitions of the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred; and if a party to any action now pending, or hereafter brought, shall offer evidence with reference to his physical or mental condition, or the alleged cause thereof, * * * the right conferred" by section 20-1206, *supra*, "shall be deemed to have been waived as to any physician or surgeon who shall have attended said party or said deceased person."

In *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688, this court held: "A stipulation in a contract of life insurance to the effect that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver within the meaning of said sections, and renders the attending physician a competent witness as to the confidential disclosures made to him by the assured concerning his last sickness."

The policies in the instant case provide that proofs of death shall be accompanied by a physician's statement. Condition 5 of the smaller policy (exhibit 4) reads: "The insured shall not be entitled to any benefits for sickness or accident under this policy unless a certificate on the company's form by a regular licensed and practicing physician who is satisfactory to the company, showing the nature of the sickness or injury, shall first be furnished the company or its authorized agents. * * * The company shall have the right at its option to make such investigation into matters upon which any claim may be based or the subject thereof as it may deem necessary in order to determine its liability hereunder." The larger policy (exhibit 5) provides: "Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to the claimant, physicians and other persons, and shall contain the record, evidence and verdict of the coroner's inquest, if any be

held." The conditions contained in the policies, as herein stated, contemplate a waiver, on the part of the insured, of a privileged communication of his attending physician before his beneficiary can receive any benefits under the policies.

A competent annotator states: "Practically all the authorities—with exception of those from two jurisdictions, which are affected by the particular provisions of the statute on the point—recognize that the waiver by an applicant for an insurance policy, either in his application or in the policy itself, of the disqualification of his physician or surgeon to testify concerning confidential communications between them, is valid and binding upon those claiming any interest in the policy." 54 A. L. R. 412. See *Falkinburg v. Prudential Ins. Co.*, 132 Neb. 831, 273 N. W. 478.

Plaintiff contends that the court erroneously admitted the evidence of J. W. Zook, an agent of the company, who had previously testified in municipal court, by permitting his testimony to be read in the trial in the district court. This objection is without merit.

In *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964, it was held: "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable." See *In re Estate of O'Connor*, 101 Neb. 617, 164 N. W. 570; *Jerich v. Union P. R. Co.*, 97 Neb. 767, 151 N. W. 310.

The record discloses that Mr. Zook had been transferred to Kansas City, and did not intend to remain in Omaha.

Other assignments of error, not herein discussed, are not pertinent to a decision in this case, and are incidental to the alleged errors committed by the trial court, hereinbefore discussed.

The plaintiff is entitled to judgment against the defendant for the amount of the premiums tendered by the insured to the company, in the sum of $14.40, and in addition thereto the sum of $126, representing the amount of the paid-up insurance due at the time said policies lapsed for nonpayment of premium, to wit, December 21, 1936.

We hold that the trial court properly sustained defendant's motion for a directed verdict.

AFFIRMED.

BERNICE L. WERT, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLANT.
283 N. W. 506

FILED JANUARY 20, 1939. No. 30441.

1. **Trial.** "When at the close of all the evidence there is a substantial conflict in the evidence, it is proper for the court to deny a motion for a directed verdict and to submit the disputed questions of fact for the determination of the jury." *Nittler-Rhump v. Jones*, 112 Neb. 238, 199 N. W. 542.
2. **Evidence:** ADMISSIONS OF AGENT. "An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made. Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiations to which it refers, is not admissible against the principal, unless it was made under such circumstances that the silence or acquiescence of the principal makes the admission his own, or was ratified by the principal. * * * The admission which it is sought to use must have been made in connection with the discharge of the agent's duty, must have been based on his own knowledge, and must be a statement of fact, rather than an expression of opinion." 22 C. J. 367.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Brown, Fitch & West, for appellant.

Beghtol, Foe & Rankin, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

In this case the plaintiff, as beneficiary, sues to recover

$2,126, which she alleges is due her upon five contracts of retirement annuity insurance entered into between her deceased sister, Julia M. Wert, and the defendant.

The defendant claims that it has paid said indebtedness by its draft for said sum which was made payable to the plaintiff, delivered to, accepted and indorsed by the plaintiff, and honored and paid by the defendant.

The burden of proof was on the defendant. The action was tried to a jury. At the close of the evidence defendant moved for a directed verdict or a dismissal. The motion was overruled. The jury returned a verdict for the plaintiff in the sum of $2,628.99.

A motion for a new trial was made by the defendant, which was overruled.

Plaintiff moved for the allowance of an attorney's fee, which motion was sustained, and an attorney's fee of $700 was granted. The defendant then moved to set aside the order granting the attorney's fee and to retax the same, which motion was overruled.

The defendant's first assignment of error is: "The court erred in overruling defendant's motion for a directed verdict made at the close of all of the evidence." This requires an examination of the evidence. We mention herein the material facts about which there is a dispute.

The defendant called as a witness Charles E. Reilly, one of its Lincoln agents. Four months earlier plaintiff had attempted to take his deposition in this case, and on the advice of his counsel, he refused to answer questions on the ground that it might incriminate him. Reilly testified that he had known the plaintiff and her sister for a number of years, that he had written their applications for retirement annuities, and had had other business transactions with them; that plaintiff had signed papers in his office possibly 100 times; and that plaintiff was a teacher in the public schools, very intelligent, and well-versed in business affairs.

In 1932, while Julia M. Wert was living, her policies were delivered to Reilly for the purpose of having changes

made in them. He claims to have returned the changed policies to her. The plaintiff denied that the policies were ever returned by Reilly.

Reilly received from the defendant and presented to the plaintiff a proof-of-death blank to be used in making claim for benefits. The original is in evidence. The amount of insurance in *dollars* payable under the policies has not been filled in. Reilly testified that there was no way for the plaintiff to know how much defendant owed her except what he told her, and that at the time she executed the proof of death he told her she had approximately $2,000 coming. Plaintiff testified that she did not know until 1937 that she was entitled to more than $35 a month, and that Reilly did not tell her then, or at any other time, that she was entitled to "that sum of money."

Reilly testified that plaintiff left the policies at his office "about May 8, 1933." After the proof of loss was sent in, Reilly received from the defendant a draft for $2,126 payable to the plaintiff, with instructions not to deliver it unless the policies were obtained and returned to the defendant's Omaha office. The draft was dated April 11, 1933, and Reilly testified that he received it shortly after that date; that he saw Miss Wert "about this draft" at the time she brought the policies in; that the draft was in his possession on May 8, 1933; that "some time elapsed between the time that the policies were sent in to the Equitable and the check was turned over to me;" that he first got the check prior to March 8, 1933 (probably May), but that he did not remember the number of days. When it was called to his attention that the draft was not cashed until May 27, 1933, he testified that he received the draft "some time between April 11 and May 27, 1933;" and still later he testified that the "check was in Miss Wert's possession from the time the policies were delivered until it was indorsed;" that he did not know why he had not said that before; that he gave her the check to take away either on May 8 or some time between that and May 27; that plaintiff had the check in her possession part of the time

from May 9 to May 27; that he did not know when he turned the check over to plaintiff. Still later he said he presumed he gave the check to her the day it was cashed; and that he did not know why he kept the check for three weeks.

Plaintiff testified that Reilly did not give her the disputed check; that she first saw it, with the disputed signature, in 1937; that up until that time she did not know that such a check had been issued payable to her order; nor did she know that her purported indorsement was on the check.

On the back of the draft was written "Bernice L. Wert, 1810 Garfield, Lincoln, Nebraska," and underneath, "Chas. E. Reilly." Reilly testified that he saw the plaintiff write her name there, that she indorsed it "in my office," with a fountain pen, around May 8, 1933. Later he testified that he did not recall that he had said that she had indorsed it in his office. He stated that plaintiff's indorsement on the check was in green ink, and that he did not have green ink in his office because "it would not photograph successfully."

When the plaintiff was asked, "Is that your signature on the back of that check?" she answered, "No; I never saw the check." She was then asked by her counsel, "Did you ever indorse or sign that check knowingly?" Her answer was, "No, sir."

On cross-examination, defendant's counsel quoted that question and said, "I don't know just what he meant by saying 'knowingly.' Do I understand your position to be that that signature, 'Bernice L. Wert, 1810 Garfield, Lincoln, Nebraska,' on exhibit A-141, that you did not write that, is that correct?" Plaintiff answered, "I did not write that."

With reference to the disposition of the proceeds of the check, Reilly testified that in March, after Julia M. Wert's death, he and the plaintiff began to talk about Reilly's keeping the money as a personal loan; that plaintiff thought it over two or three weeks; that it was agreeable to the plaintiff; that on one of her visits to his office he had shown her the check; and that on the day that plaintiff indorsed

the check, around May 8, 1933, he had a conversation with her with reference to the proceeds of the check to the effect that, if she would let him have the money, he could pay out the balance of her premiums, the original loans would be cleared up, and her policies would be clear; that he was to pay the premiums "during the period for which the premiums had been prepaid originally;" that he was interested in the check because he was going to borrow the money; that he told the plaintiff he would pay all the premiums; that the total amount he was to pay out of her money was about $2,600; that he agreed to pay her debts without knowing how much they were; that they had no writing between them; that they made no list of what he was going to pay; that the policies upon which he was to prepay premiums were not listed; that the plaintiff did not demand a receipt; that he did not suggest giving her one; that he said nothing to her about giving her a note or written evidence of the debt; that the plaintiff said nothing about interest on the loan; that immediately after he got the money he was to invest it in real estate; that nothing was said about whether the investment in real estate was to be for the plaintiff or Reilly; that the plaintiff was to have no part in the investment in real estate; that nothing was said about an accounting to the plaintiff for this money; that the plaintiff owed $486 on one policy and $135 on another; that he did not pay off these loans; that he paid $500 on July 24, 1933, as a premium; and that he owed the plaintiff $1,626.

Plaintiff denied the entire story which Reilly told with reference to the agreed disposition of the proceeds of the check, and denied that she had received any part of the $2,126.

Reilly testified that *on the day plaintiff indorsed the draft* he personally took it to the First National Bank and indorsed it, secured the money in currency on *May 27*, 1933, put the currency in his safety box in the Commerce Trust Company, and used it for his own purposes; that he did not know how long he kept the money before he began

to spend it; that he did not know where he got the money with which to make the $500 payment; that he did not tell plaintiff that he had made the payment; that he does not know whether or not she received a receipt; that he did not know whether plaintiff ever knew he had paid it; that he was not interested in getting some acknowledgment from her that he had paid it, and that he did not conceal the payment from her.

Plaintiff testified that to her knowledge she had no loans on her policies, and that she did not know Reilly had sent $500 to the defendant company, purporting to be a premium payment from her; nor did she know that Reilly had cashed the check and taken the money.

James H. Clapp, a witness for the defendant, testified that he was the cashier in the Omaha office of the defendant; that he received the check of $2,126 from defendant and sent it "to our agent, Mr. Charles E. Reilly" at Lincoln; that he knew the home address of the plaintiff at the time he sent Reilly the check; that he later received the policies and sent them to the home office for cancelation on May 9, 1933; and that in July, 1933, he received a draft for $500 from Lincoln as a premium on two of plaintiff's policies, and that it was so applied.

The defendant introduced 53 checks and various other papers bearing the admitted signature of the plaintiff.

Herbert J. Walter of Chicago, a witness for defendant, testified as a handwriting expert. After qualifying as such, and discussing at length the admitted signatures and the disputed one, he gave it as his opinion that the signature on the disputed check was written by the same person who wrote the signatures on the checks admitted to be the genuine signatures of the plaintiff; that it was the same ink; that he had not the slightest suspicion that any one other than the plaintiff wrote the indorsement on the disputed check, and that he knew nothing about the circumstances under which the disputed signature was written.

Robert M. Walker, of Chicago, likewise qualified and testified as a handwriting expert for defendant. He gave his

reasons at length and testified that, in his opinion, the disputed signature and the admitted signatures of the plaintiff were written by the same person. When asked if green ink would photograph all right, he replied, "You have to have color screens or it won't photograph at all;" and that where different colors were involved it was necessary to take more than one picture, with different screens, to get all the signatures, and then make a composite picture.

Plaintiff offered, as a witness, a commercial photographer of Lincoln, who qualified as an expert. He testified that it was possible to photograph green ink without the use of a screen or filter; that he took a picture of the back of the check bearing the disputed signature without the use of any screen. The picture so taken was received in evidence and the disputed signature shows clearly upon it.

Defendant also called the paying teller of the First National Bank of Lincoln as an expert witness. The records of the bank show that he cashed the disputed check. He examined the plaintiff's admitted signatures, compared them with the disputed signature, and gave it as his opinion that plaintiff signed all of them.

The cashier of the National Bank of Commerce, of Lincoln, qualified as an expert witness; examined the admitted signatures and the disputed signature; and gave it as his opinion that they were written by the same person.

The jury were furnished with a magnifying glass and were permitted to examine the exhibits bearing the admitted signatures of plaintiff and the disputed signature.

We have not included in the foregoing summary any reference to the evidence, the admission of which defendant claims was an error. That evidence is favorable to the plaintiff; hence, our omitting it in the consideration of the first assignment does not prejudice the defendant. Defendant's first assignment of error is based on the proposition that this "evidence is insufficient to support a verdict in favor of plaintiff," and that "the evidence is insufficient as a matter of law to sustain a finding that the indorsement on the back of the disputed draft or check is not the indorse-

ment of the plaintiff," and that for those reasons the trial court erred in overruling defendant's motion for a directed verdict at the close of all the evidence.

To sustain its proposition defendant cites the case of *In re Estate of O'Connor,* 105 Neb. 88, 179 N. W. 401. In that case, the question before the district court for determination, without a jury, was the question as to whether or not the signature of one John O'Connor to a purported will was genuine. The county court held the signature to be a forgery; the district court held it to be genuine; and this court on appeal held it to be a forgery. In the opinion, this court stated the issue thus:

"Was the trial court clearly wrong in finding that the will offered by proponents for probate was genuine?"

The court reviewed the evidence, the testimony of the witnesses, the circumstances surrounding the finding of the alleged will, its form, the testimony of the expert witnesses, and reached the conclusion that both "the expert testimony and the circumstances in which the truth on the sole issue of fact is found confirm the charge of forgery and condemn the will as spurious."

This court in that opinion said: "When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances." This court further said: "From the standpoint of a genuine will the stories of the witnesses who testified that it was executed and found are unusual, if not fanciful."

Reilly's story as to the indorsement of the check, the circumstances surrounding that alleged transaction, and the agreed disposition of the proceeds, with its many contradictions, is "unusual, if not fanciful." Applying to this case the test made in the *O'Connor* case, we are unable to say that the jury were "clearly wrong" in finding that the signature of the plaintiff was not genuine, and for the same reason we are unable to reach the conclusion that the trial court was "clearly wrong" in submitting the disputed questions of fact to the determination of the jury.

The defendant also cites the case of *Bank of Commerce v. McCarty,* 119 Neb. 795, 231 N. W. 34. The issue of the forgery of a note was involved. The alleged maker of the note (defendant) positively denied the signature. She denied the circumstances under which it was alleged that she had admitted or acknowledged that the signature was hers. This court said that "the evidence as to note number 6367 being a forgery is sharply conflicting, and the same is true as to the other material points of dispute between the plaintiff and defendant," and affirmed a verdict of the jury finding for the defendant.

In the syllabus of *Bank of Commerce v. McCarty, supra,* this court held: "Testimony of handwriting experts that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed."

This is not a holding, however, that the testimony of expert witnesses that a signature is genuine is, as a matter of law, sufficient to overturn the testimony of the alleged signer that she did not sign the disputed instrument.

"When at the close of all the evidence there is a substantial conflict in the evidence, it is proper for the court to deny a motion for a directed verdict and to submit the disputed questions of fact for the determination of the jury." *Nittler-Rhump v. Jones,* 112 Neb. 238, 199 N. W. 542.

The evidence in this case, which we have summarized, is its own best commentary. From all of the testimony, we are unable to say that the verdict of the jury is clearly wrong, and, consequently, cannot reach the conclusion that the trial court erred in refusing to direct a verdict or dismiss the case.

The question of the genuineness of the signature was submitted to the jury under an instruction in which the court stated:

"Plaintiff denies that the indorsement of the name 'Ber-

nice L. Wert,' on the back of said draft or voucher, is her signature and says that she did not sign same. Therefore the burden is upon defendant to prove by a preponderance of the evidence that it did pay the plaintiff and that she received and accepted draft in payment of her claim against defendant. * * * If you find from a preponderance of the evidence that plaintiff accepted the draft in payment of her claim and that the indorsement is in fact the genuine signature of the plaintiff, your verdict should be in favor of the defendant. On the other hand if you find that the signature is not the genuine signature of plaintiff, then your verdict would be in favor of plaintiff."

This instruction is set out for the purpose of showing the view taken by the court of the issues and the testimony, and the questions which were submitted to the jury. The defendant, in this court, does not allege error in that or any other instruction. We conclude, therefore, that defendant's first assignment of error is not sustained.

For its second assignment of error, defendant claims that the trial court erred in permitting one Edith B. Ross, a niece of the plaintiff, to testify as to conversations had with the plaintiff, Mr. Croxson, Mr. Clapp, and Mr. Reilly, at Omaha, some four years after the disputed check was cashed.

For its fourth assignment of error, defendant claims that the trial court erred in allowing plaintiff to testify as to conversations had with her niece, Mrs. Ross, Mr. Croxson, Mr. Clapp, and Mr. Reilly, at Omaha, some four years after the disputed check was cashed.

Mr. Croxson was defendant's agency manager for Nebraska and its highest officer in the state.

On this phase of the case, the testimony of the plaintiff is that she and Mrs. Ross went to defendant's office in Omaha in March, 1937, on two occasions, about a week apart, to consult with defendant concerning Reilly. The first meeting was in Clapp's office. They conferred with Clapp and Croxson, and she told Clapp $35 a month was a rather small amount to receive for what had been paid

to defendant. Clapp said, "Don't you recall that we sent you a check for $2,126?" and that she said she had never heard of it; that Croxson said, "I was watching your face when Mr. Clapp told you of this check, and I knew by the expression on your face that you had never heard of it;" and that she did not know that there was anything additional due her until that trip. According to plaintiff's testimony, this quoted statement was made during the conversation had on the first trip to Omaha.

The second conversation took place in Croxson's office, and Reilly was present. The plaintiff testified that she did not know Reilly was to be there. She repeated what she had said on the previous visit to the effect that she had never seen nor heard of the check; that Clapp did the talking and showed Reilly the check, and asked him what he knew about it; that Reilly said plaintiff had indorsed the check and he had cashed it; that Reilly did not make any claim that he had borrowed the money to pay debts or invest in real estate; that Reilly said he owed her $1,600, and had paid $500 premium from her money; that Reilly said that he might have done some things that he should not have done, but that he had not committed forgery; that Croxson and Clapp gave her to understand that they thought she had received the $2,126.

Mrs. Ross testified that during the first conversation Mr. Clapp said: "At last I think we have Charlie Reilly's back to the wall. We have been suspicious of him for a long time but he always wiggled out of it. I think we have him now where he won't be able to get away with it."

Mrs. Ross was asked, "What was said on the *second* trip by your aunt and these gentlemen about this check?" She testified: "My aunt said she had never heard of the check before and Mr. Croxson said he knew that was true because he watched her face as they told her about it and he could tell she had never seen or heard about it before."

Defendant made proper objections to the introduction of this testimony, and its objections were overruled by the trial court.

Croxson was not called as a witness. Clapp did not deny any part of this testimony.

This court in *Waits v. Columbia Fire Underwriters Agency*, 129 Neb. 207, 261 N. W. 170, cited, with approval, the following rule from 22 C. J. 367:

"An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made. Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiation to which it refers, is not admissible against the principal, unless it was made under such circumstances that the silence or acquiescence of the principal makes the admission his own, or was ratified by the principal. * * * The admission which it is sought to use must have been made in connection with the discharge of the agent's duty, must have been based on his own knowledge, *and must be a statement of fact, rather than an expression of opinion.*"

The rule is stated in 22 C. J. 383, as follows:

"An admission made by the agent of an insurer is competent against the principal, provided, but not unless, it appears to have been made within the scope of the agent's authority at the time when it was made, and while he was engaged in the business of the principal, and that it amounts to a statement of fact rather than an expression of opinion."

The rule is stated in 22 C. J. 386, as follows:

"Admissions of an agent of a private corporation, when relevant to the issues, are competent against the corporation, provided, but not unless, they are within the scope of the powers of the declarant, were made in connection with the performance of his duties, and are statements of fact rather than mere expressions of opinion."

The rule is stated in 1 Jones, Evidence Civil Cases (4th ed.) 630, sec. 344:

"Declarations of conclusions or opinions, even though they may have been uttered under conditions which would

authorize their introduction if they were statements of facts, are not admissible as part of the *res gestæ*."

The rule is stated in 22 C. J. 469, as follows:

"Expressions of opinion are not ordinarily admissible as part of the *res gestæ*, even though they are accompanied by acts tending to show that the declarant really entertained the opinion so expressed."

The quoted statements, made by Mr. Clapp as to Mr. Reilly, and as to what Croxson "knew" from the expression on Miss Wert's face, are conclusions, statements of the opinion of the makers, narrative in form, are not statements of fact, and hence are not admissible.

Permitting Mrs. Ross to testify as to what Mr. Clapp said about Mr. Reilly was to tell the jury, in effect, that one of the officers of the defendant company believed the witness Reilly to be dishonest and that others in the defendant company believed the same thing. It is pointed out that this statement related to their opinion of him in 1937 and not in 1933 when he was trusted with the draft for plaintiff.

Permitting the plaintiff and the witness Mrs. Ross to testify as to what Mr. Croxson said was in effect to tell the jury that the general agent of the defendant company in Nebraska believed that plaintiff was telling the truth when she denied knowledge of the check. The admission of those two statements in evidence invaded the province of the jury, affected the substantial rights of the defendant, was prejudicial, and calls for a reversal of the case.

Defendant's third assignment is based upon the following question, which the court, over objection, permitted plaintiff to answer: "Up to that time did you have trust and confidence in him?" Plaintiff answered, "Yes." The question related to a conversation had with Reilly the early part of 1932. The defendant objected to the question as incompetent, irrelevant, and immaterial, and a self-serving declaration. The court supposed "it is foundational for something coming." Plaintiff's counsel said, "Yes, and shows the state of mind."

It is obvious that, at the time covered by the question, the plaintiff had full confidence in Reilly. It is likewise obvious that subsequent to that time, as a result of what has been disclosed in this record, she lost that confidence. We cannot believe that any substantial right of the defendant was affected by the facts disclosed in this assignment of error.

Defendant's fifth assignment of error goes to the question of attorney's fees. In view of the conclusion that we have reached in this case, it is not necessary that that assignment be considered.

Because of the errors pointed out in the admission of evidence, the judgment against the defendant is reversed, and the cause remanded for further proceedings.

REVERSED.

IN RE APPLICATION OF WILLIAM A. TYLER, SUPERINTENDENT. WILLIAM A. TYLER, SUPERINTENDENT OF BOARD OF DIRECTORS OF CONGREGATIONAL CONFERENCE OF NEBRASKA, APPELLANT, V. GERMAN CONGREGATIONAL CHURCH OF ZION ET AL., APPELLEES.

283 N. W. 512

FILED JANUARY 20, 1939. No. 30453.

Evidence examined, and decree of trial court affirmed.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *A. B. Wallace,* for appellant.

Wills & Wills, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

This is an action brought under the provisions of sec-

tion 24-830, Comp. St. 1929, to secure the transfer of certain real estate of the German Congregational Church of Zion, of Butte, Nebraska, to the Board of Directors of the Congregational Conference of Nebraska.

The application is made by the superintendent of said conference. The action is resisted by three members of the church, who answer as trustees of the German Congregational Church of Zion, for themselves individually, and for all members of the said church and the church itself. For convenience in discussing the case, we will refer hereafter to the applicant as plaintiff and to the answering parties and the church, whose property is involved, as defendant.

Plaintiff alleges its own corporate capacity, the incorporation of defendant, that the defendant became affiliated with the other Congregational churches of this state in the congregational manner, "under, by virtue of and in accordance with the laws, customs, usages and discipline of the Congregational Conference of Nebraska;" that defendant does not now exist and does not now maintain its organization as a Congregational church in accordance with such laws, customs, usages, and discipline; alleges the defendant's ownership of property during its existence, and prays that the title of the property be transferred to plaintiff.

Defendant denies that the plaintiff is of the same religious denomination as the defendant, denies its affiliation with plaintiff, and alleges that it has at all times been, and now is, an independent existing organization, and that the plaintiff never exercised any authority or supervision over defendant.

Section 24-830, Comp. St. 1929, is as follows: "Whenever any religious society which is in any way under the control or supervision of any superior or general supervising body, ceases to exist or to maintain its organization, all its remaining real or personal property shall vest in, and be transferred, in the manner hereinafter provided, to the incorporated annual conference, presbytery, diocese, dio-

cesan council, state convention or other incorporated governing or supervising body of the same religious denomination within whose jurisdiction such society was located, or with which it was affiliated, it being intended that said property shall vest in and be transferred to the highest governing or supervising corporate body of the same denomination, having its original corporate existence within this state."

To maintain this action it is necessary for the plaintiff to establish two propositions: First, that the defendant church "is in any way under the control or supervision of any superior or general supervising body," and that the plaintiff is that general or superior supervising body; second, that the defendant has ceased "to exist or to maintain its organization."

The trial court found that the plaintiff "has no cause of action" and dismissed the application. Plaintiff appeals.

We first consider the question: Was the defendant "in any way under the control or supervision" of the plaintiff?

Control is defined as follows: "The word has no legal or technical meaning distinct from that given in its popular acceptation. It has been held as synonymous with superintendence, which is expressive of the meaning of the word, being defined as the act of superintending; care and foresight for the purpose of directing and with authority to direct; power or authority to check or restrain; restraining or directing influence; regulating power. Likewise the word 'control' is also sometimes employed or used as equivalent to, if not synonymous with, management; government; supervision." 13 C. J. 837.

Supervision is defined as follows: "Act of overseeing, or supervising; having general oversight of, especially as an officer vested with authority; inspection; oversight; superintendence. 'Supervision' implies oversight and direction." 60 C. J. 1164.

It appears to have been assumed at the trial that the plaintiff is the "incorporated annual conference * * * or other * * * governing or supervising body of the same re-

ligious denomination" of the Congregational churches of Nebraska. We will discuss that proposition only in so far as is necessary to consider it in relation to the problems presented by this case. The plaintiff conference was incorporated in 1910 by a group of men who recite in the preamble that they are members "of the religious denominational body or conference now known as the Congregational Conference of Nebraska," and that they incorporated "on behalf of ourselves and all others who are now or may hereafter become members of *this* corporation." The members of the plaintiff corporation "shall be such persons as have been duly elected directors of the Congregational Conference of Nebraska." Its objects, in part, are to coordinate under one management the "common activities of its members" and "to cooperate with our national beneficent societies, with the National Council of Congregational Churches, and with the *Nebraska* Home Missionary Society so long as that society shall maintain a *separate* existence," and "It shall receive * * * all * * * property * * * acquired * * * by the Nebraska Congregational Conference, *or to this corporation.*"

The plaintiff corporation by its articles is responsible and subject to the "authority of the Congregational Conference of Nebraska;" the qualifications of its treasurer are such as those required "in the constitution of the Congregational Conference of Nebraska." The constitution referred to is not in evidence. The plaintiff did not prove "the laws, customs, usages and discipline of the Congregational Conference of Nebraska." From a reading of the articles, there appears to be a difference between the plaintiff and the conference; also, that the conference is the governing body.

There was organized in 1857 in Nebraska by the Congregational churches an organization called "The General Association of Nebraska." The record does not disclose whether or not the General Association of Nebraska was a corporation; nor does it give much information about it. The plaintiff does not have "anything in a historical way

that would aid us in determining whether or not there was a sort of parent organization in 1857 and from there on down to the time of incorporation of this present body" and that the plaintiff is "simply a reorganization of the old organization."

The defendant in its articles of incorporation adopted a constitution "as is set forth and contained in the certain church manual known as that of Rev. M. E. Eversy, D. D." That "church manual" is not in evidence.

Plaintiff's superintendent was asked if he knew the Rev. Eversy. He answered that he did, and that Eversy "was superintendent of the *German* Congregational work for the whole country, for the United States." He was then asked and answered the following questions: "Q. Was he affiliated with your organization? A. Oh, yes; he was *employed* by the denomination. Q. Are you familiar with the manual there to some extent? A. I know what it was. It was a manual that *they* took as a constitution for *a* Congregational Church; since we are Congregationalists each church could adopt it or not." This evidence does not show that defendant was a part of the Congregational Conference or under its supervision or control, or under the supervision and control of plaintiff.

Defendant's articles further provide that the powers and duties of its trustees are as follows: "They shall hold the property of the church, superintend the raising of the minister's salary, provide for the incidental expenses, subject always to a direct vote of the church, but having no power to buy or sell, mortgage or *transfer* property, without a special vote of authority of the church."

After defendant's organization, it secured title to three lots in the city of Butte, upon one of which it built a church, and upon two lots it built a parsonage. The church building was later given to the English Congregational Church at Butte, and later became a part of the "community" church at Butte as it now exists, which the "Congregationalists" have a right to use. It likewise appears that the community church at Butte is not considered to be a Congregational

church. The lot upon which the church building was located was sold by the defendant in 1934. That sale was considered in this proceeding, and the district court quieted title in the purchaser. Plaintiff does not now seriously question that part of the decree.

Defendant secured a loan of $400 from the "Congregational Church Building Society of New York" in 1895. That mortgage contained a stipulation that the defendant shall "continue to be an *Evangelical* Congregational Church" and "make an annual contribution to the Congregational Church Building Society," and that, upon failure to do those and other things, the amount covered by the mortgage should become immediately due and payable, and that in the event the mortgage is paid the estate created by the mortgage became void. This mortgage was released of record by release dated in November, 1906. When asked regarding the organization of the mortgagee, plaintiff's superintendent replied: "We have in New York City what is called the Congregational Church Building Society which makes loans to Congregational Churches * * * and when I once inquired whether it could make a loan to a community church they said no, they could only make loans to Congregational Churches."

There is nothing in the record to show the authority and power of the Congregational Church Building Society of New York, and nothing other than the "we have" to show that it is in anywise connected with the plaintiff. The statement that they would make loans only to Congregational Churches, even if we disregard its hearsay status, does not show that that limitation was applicable when this mortgage was made in 1895. There is no evidence to show that an Evangelical Congregational Church is the same as the plaintiff church organizations. Quite obviously, the recitations in the mortgage were placed there as a part of the security for the loan. There is nothing in the mortgage or otherwise indicating that the plaintiff's preceding organization had anything to do with the securing of that loan by the defendant from the New York society. The defendant

in 1898 appears to have conveyed an undivided interest in the parsonage property to two other German Congregational Churches (one in Nebraska and one in South Dakota) and to have had that undivided interest reconveyed to it in 1905. There is nothing in the record to indicate that the plaintiff's preceding organization had anything to do with the conveyance away of this property or its conveyance back to the defendant.

It further appears, without the contract being in evidence, that the defendant contracted to sell the parsonage property in 1937, and that a part of defendant's remaining eight members had in mind the probable division of the proceeds of the sale among themselves. The bringing of this action resulted in the rescission of that contract of sale.

In addition to the provision in the mortgage, plaintiff contends that its supervision and control is shown by the fact that defendant made reports to the plaintiff from 1898 to 1922. These reports were made upon blanks sent out by the plaintiff or its predecessor to the pastor of the defendant. The pastor filled in the information called for on the blanks, and the plaintiff printed the information so furnished in its annual reports. These reports were purely statistical. They ceased in 1922, which year appears to have been the last year that defendant employed a full-time pastor. Subsequent to that time no reports were made.

Plaintiff did not offer the reports in evidence, and it "imagined" that they were destroyed. The defendant's records, written in German, were produced in court. They did not reveal that the defendant at any time ever authorized its pastor or any one else to make a report to the plaintiff, and no member of the church knows of special authority ever having been given to the pastor to do so, and no member of the church knew of the reports having been made. We conclude that these reports were made by the pastor at the request of, and for the information of, the plaintiff without authority from the defendant. There is no basis for holding that the pastor by making these reports recog-

nized any right of supervision or control of the defendant by the plaintiff.

The defendant's records further show that at different times it made contributions to the building society at New York, and to the Home Missionary Society. Plaintiff's superintendent testified that he "presumed" that that was the National Home Missionary Society in New York. Members of the defendant church testified that they made contributions to missions and to other purposes. There is nothing in the record indicating that the defendant church ever made contributions to the plaintiff, although it appears that, if contributions were made to different national organizations, those organizations in turn reported to the plaintiff that they had received the contributions from the defendant. This was purely a voluntary matter so far as the contributions were concerned, and the reports were statistical.

The plaintiff's superintendent testified that the Congregational Churches in Nebraska were organized "first into a district association and then into the state conference * * * and then we have our national conference." There is nothing to indicate that defendant ever joined in any way, was represented at, or participated in the district association or the state conference of the plaintiff. The superintendent further testified that the German Congregational Churches in Nebraska have "the *privilege* of nominating two members of the board of directors." This apparently presupposes a German Congregational Church organization or some association of the German Congregational Churches that could nominate two members of plaintiff's board. Here again the record does not indicate that the defendant church ever had anything to do with such a German Congregational Church organization, or that it ever participated in such an association or conference, for the nomination of members of plaintiff's board or otherwise.

In answer to the question as to whether or not the plaintiff recommended pastors to the different German Congregational Churches of Nebraska, the superintendent an-

swered that they never recommended pastors to any church "except as they ask us to." There is nothing in the record indicating that the defendant ever asked the plaintiff to recommend a pastor or to assist the defendant church in any way about a pastor or in any other manner. Plaintiff's superintendent further in answer to the above question stated: "Now the Congregational and Baptist and others that have a congregational form of organization *do not claim to have authority over the churches; we have only general supervision.*" Later when asked, "What is the nature of the supervision of your conference over these German Churches, for instance, over the German Congregational Church of Zion here at Butte?" he answered: "Our supervision over all the churches, as I mentioned a moment ago, differs from the Methodists; *we do not have supervision over the church.* * * * We work with them for their general welfare, and we give them special services, if they desire it."

He was next asked, "Do you have anything further in regard to the supervision, or do you think that covers it?" He answered: "Well, I might say that the *German* Churches do have a more special supervision by the *German* Superintendent, but *their* German Conference is a *national organization,* so we have, as a state organization, general supervision over them as well as the others." This statement again indicates that the defendant, if subject to supervision from any one, is subject to a German Conference and a German Superintendent. The record is silent as to what that supervision may be, as it likewise is silent on the question of the German Congregational Church organization. There is no evidence to show the basis of this contention that "we have general supervision over them." Outside of the reports which were sent in by the pastor to the plaintiff, at the plaintiff's request and on its blanks, the only contact that the plaintiff ever appears to have had with the defendant was that "once or twice a good many years ago" the superintendent "happened to be in Butte; talked with some of the officers, and tried to find out how they

were getting along." He further testified that he was acquainted with the church property, and that, at the time the church building was moved away, he talked with some of the members of the "English Congregational Church," who asked him if it was all right to move the church over for the use of the English Church, and he said that he thought that it was.

Here it is noted that he did not talk with the defendant, but with members of the *English* Congregational Church, who were securing the defendant's church building. The defendant did not ask the consent of the plaintiff for permission to dispose of its church building, nor did it submit the matter to them for their advice or approval. The defendant did not ask the plaintiff for permission to sell its parsonage property, and quite clearly it was the belief of all the members of the defendant church that they had the right to dispose of their property according to the provisions of their articles of incorporation. There is nothing in the record indicating that any member of the defendant church ever had any idea that the plaintiff ever had, or claimed to have, any control or supervision in any way over the defendant. There is no showing that the defendant ever authorized a "transfer" of its property to the plaintiff "by a special vote of authority of the church," as provided in defendant's articles of incorporation; neither did it take any step by such a "special vote" that can be construed to intend such a transfer.

Plaintiff is not shown to have given any aid or assistance to, or concerned itself with, defendant's spiritual or temporal problems. It contributed nothing to the defendant. It now asks for title to defendant's property. We conclude that the plaintiff has not shown that the defendant was in "any way under the supervision or control" of the plaintiff.

Defendant does not appear to have ever had a large congregation. It did maintain a regular pastor for some time. The deeds to the other churches which are in evidence, reciting that the undivided interest of each of the parties shall be "in such proportion as the membership of each of

the several churches herein mentioned shall be to the aggregate membership of the three churches," indicate that three churches in that community were using the parsonage as a place of residence for a minister who served all three churches. The defendant has a cemetery (not involved in this action) where it buries its dead. After 1922, up to and including the time of the disposition of the church building, ministers from other churches conducted services in defendant's church building, probably once a month, and not later than two years ago a minister came and administered the sacrament of the Lord's Supper to defendant's members.

The church records are not elaborate. The term of office of the trustees had expired at the time of the hearing in the district court, but their successors had not been elected or qualified, and those hold-over trustees were continuing to handle the parsonage property, to repair it, collect the rent, and pay the taxes upon it. They appear to have held irregular meetings to transact the business of the church, and, as trustees, entered into the contract to sell the parsonage property. Members of the defendant church who understand the English language attend the community church. The membership at the present time consists of eight people who desire to have certain religious services, including the sacrament of the Lord's Supper, given in their native language, which they best understand. They are all elderly people. No action has been taken to dissolve defendant's corporate capacity, and the membership clearly presumed and intended that they were maintaining their organization. Even plaintiff's records show the defendant church was inactive in 1931 and "dropped" in 1933. The fact that plaintiff "dropped" defendant from its records does not show that defendant has ceased to exist or to maintain its organization.

One of the defendant's trustees testified that the purpose of selling the parsonage property was "to liquidate it." And in answer to the question, "You figured the church property ought to be liquidated?" he answered, "Yes."

When asked if the reason was that "they were not able to carry on the church organization and carry on an active religious society?" he replied, "I wouldn't want to say just that, I couldn't express just what the others might say."

He was then asked, "There was no necessity, if you disposed of the church property and the contents and everything, there was no necessity for a parsonage, was there?" A. "Not in particular; no."

The defendant no longer had use for a parsonage building. It proposed to sell the parsonage as it had its personal property and had disposed of its church building by gift to another church. A religious society can exist without having either a church building or a parsonage. It is common knowledge that many church organizations have existed in Nebraska throughout the entire period of our history, holding their services in homes, schoolhouses, and quite often in church buildings owned by other denominations. Many religious societies in Nebraska have no tangible property, but they exist, maintain their organizations, serve their members and their communities, and are distinct forces for good in our citizenship. Defendant still continues as a church organization, ministering to its members as they desire, and is in a position to bury its dead.

We are not presented with, and do not decide, the question as to what disposition should be made of the proceeds of the sale of the parsonage property should it be subsequently sold.

We conclude that the decree of the district court was proper, and accordingly it is

AFFIRMED.

FIRST TRUST COMPANY, SUCCESSOR-TRUSTEE, APPELLANT, V. GEORGE C. MARYOTT ET AL., APPELLEES.

283 N. W. 518

FILED JANUARY 20, 1939. No. 30443.

1. **Corporations.** Two corporate trustees adjudged bankrupts, while in possession of bonds with authority to collect principal and interest for the beneficiaries, may be treated in equity as a single corporation, where one of them owned all the stock and kept all the records of both; the officers, place of business and nature of transactions being identical.
2. **Mortgages.** A trustee appointed by a court of equity to succeed a bankrupt trustee has generally the predecessor's authority to receive payment of matured principal and interest owing to the beneficiaries of the trust on bonds secured by mortgage.
3. ———. A partial payment by a mortgagor on a matured bond secured by mortgage, if made to a trustee duly authorized to receive it for the mortgagee or for the holder of the bond, is a discharge of the bond and the mortgage to the extent of the payment, in absence of fraud or negligence on the part of mortgagor.
4. **Estoppel.** Where one of two innocent parties to a transaction must suffer a loss through the misconduct or fraud of a third person, the burden will be allowed to fall where equity and justice place it—on the one who innocently made the loss possible.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Sterling F. Mutz and *Robert S. Stauffer,* for appellant.

Alfred D. Raun and *Perry, Van Pelt & Marti, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a suit in equity to foreclose a mortgage on the real estate described in the petition.

George C. Maryott and Anna M. Maryott, mortgagors, defendants, borrowed from the Lincoln Safe Deposit Company February 23, 1924, $16,000, evidenced the debt by 16

bonds of $1,000 each and secured them by a mortgage on 80 acres of land in Thurston county. The debt was subsequently reduced by payments to $8,000 prior to March 1, 1933. The mortgage and bonds were assigned by the Lincoln Safe Deposit Company to the Lincoln Trust Company September 18, 1928. The two companies named, while engaged in transacting business as trustees, were adjudged bankrupts July 9, 1932, and, by order of court, the First Trust Company became their successor-trustee, and in that capacity brought this foreclosure suit as plaintiff, alleging that the unpaid debt of the Maryotts, mortgagors, was $9,090.64, May 13, 1932, and that no part thereof has been paid except $1,872.50. Judgment for the difference was demanded with a prayer for foreclosure.

In an answer to the petition defendants pleaded payment of $7,490 on the debt after it was reduced by payments to $8,000, and offered to pay the difference between those items with interest. The reply to the answer was a general denial.

Upon a trial of the cause the district court found that defendants had paid $7,490 on the 8,000-dollar debt and that they still owed $632.12 with interest from June 24, 1932. Defendants were permitted to discharge the unpaid debt and the mortgage by payment of the amount found to be due, but, in the event of default in such payment, foreclosure was ordered. Plaintiff appealed.

The issue on appeal, as in the trial court, was the payment of $7,490 on the debt secured by the mortgage after it was reduced by payment to $8,000. The contentions of plaintiff, in substance, are that eight bondholders are the beneficial owners of the security; that they never received the alleged payment; that the bonds in controversy were not surrendered to defendants or indorsed as paid and were never paid; that the First Trust Company, plaintiff, is the owner and holder of the mortgage as successor-trustee of the two bankrupt companies for the benefit of the eight bondholders.

The position of defendants is that they paid to the Lin-

coln Trust Company before it became a bankrupt, while it was in possession of the bonds with authority to receive payment, $7,490, and that this was payment of the mortgage to that extent.

It is shown without dispute that defendants had fire insurance of $8,000 in four insurance companies on a store building destroyed by fire. The fire loss was adjusted at $7,490, each of the four insurers paying by draft $1,872.50. George C. Maryott, defendant, indorsed the drafts and sent them by mail to the Lincoln Trust Company before it was adjudged a bankrupt. Proceeds of one of the drafts were in fact credited *pro rata* on the bonds. Each of the bonds contains an agreement in this form:

"All payments to be made on this bond, whether principal or interest, shall be made to said Lincoln Safe Deposit Company, for the benefit of the holder thereof."

The parties to the mortgage entered into an agreement March 19, 1928, extending the time for payment from March 1, 1928, to March 1, 1933, making "both interest and principal payable at the office of the Lincoln Trust Company in Lincoln." This extension agreement is part of the petition which alleges that the successor-trustee "is given full power and authority as such trustee to collect and receipt for the interest and principal of such loans."

March 29, 1932, mortgagors gave additional security for the bonds and unpaid debt of $8,000 by the execution of another mortgage for that amount on 16 acres of additional land in Thurston county. This mortgage was payable to the Lincoln Safe Deposit Company, mortgagee. If others should become holders of the bonds, the Lincoln Trust Company was authorized by the mortgage to make collection in the event of default, to satisfy the mortgage, if paid, and to distribute the proceeds to such bondholders.

The bonds and the mortgage were continuously in possession of the Lincoln Trust Company or its successor-trustee, but the beneficial interests therein were assigned to the eight beneficiaries by means of certificates of participation in those instruments. The certificates in addi-

tion to the assignments contained on their faces the following conditions:

"This is to further certify that said Lincoln Trust Company retains the legal title to said bond and mortgage in trust for the use and benefit of the holders of said participation certificates, for the purpose of collecting same and enforcing payment thereof, and distribution of the proceeds thereof equally and ratably among the holders of said participation certificates, according to their several interests."

The fire insurance policies provided that loss or damage, if any, shall be payable to Lincoln Safe Deposit Company, mortgagee, or trustee, "as interest may appear."

The two bankrupt companies were for all practical purposes one corporation. The business transactions were similar. Their offices were in the same building. Their officers were the same. The Lincoln Trust Company owned all the stock of the other and kept the records of both. Identification of the two as one was recognized in former litigation. *First Trust Co. v. Danielson,* 132 Neb. 141, 270 N. W. 680; *Kansas City Life Ins. Co. v. Neverve,* 133 Neb. 29, 274 N. W. 390.

The eight beneficiaries never had possession of the bonds. Their beneficial interests were evidenced by the certificates of participation in which the legal title to the bonds and the mortgage was retained in the trustee for the purpose of collecting the debt and distributing the proceeds of the paper among the beneficiaries. The evidence makes it perfectly clear that the beneficiaries held their interests subject to the power of the trustee to receive payment and in default thereof to foreclose the mortgage, and that mortgagors were obligated by solemn contracts in writing to pay their debt to the mortgagee or to the trustee. The authority of mortgagee and original trustee to receive payment and to enforce collection in the event of default was transmitted to the successor-trustee. The latter exercised that authority in the foreclosure proceeding. The beneficiaries confided in and trusted the two now bankrupt corporations and their officers. Mortgagors, as directed by

their written agreements, paid to the Lincoln Trust Company $8,000 on the original debt. They also paid from the fire-insurance fund $1,872.50 credited on the bonds. The entire insurance fund was on the same footing and should have been so credited. The payment of $7,490 was a partial payment only and did not confer on mortgagors the right to demand the surrender of the bonds or the possession thereof as paid. Mortgagors had no part in any negligence or misappropriation by which the beneficiaries were defrauded. George C. Maryott, the principal mortgagor, testified that the names of the beneficiaries were unknown to him and that he never had any dealings with any of them. He made partial payment at the place and to the mortgagee or trustee appointed in his written obligations. The evidence and the rules of equity will admit of no other conclusion. There is evidence, however, that mortgagors were indebted to the same payee or trustee on other paper secured by mortgage, but the necessary conclusion from the record is that the transactions relating to the fire-insurance fund were directed to a partial payment of the debt secured by the mortgage in controversy. Notice that the payments made were authorized was communicated to the beneficiaries by certificates of participation in their own hands. By permitting their trustee to retain possession of the bonds with authority to receive payment for them, they made the loss of which they complain possible. In equity they must bear it, since mortgagors were not negligent or otherwise at fault.

Having reached the conclusion that defendants made the payment pleaded by them in their answer, as found by the district court, the discussion of other questions argued on appeal becomes unnecessary.

AFFIRMED.

MABEL MOISE, APPELLEE, V. FRUIT DISPATCH COMPANY, APPELLANT.

283 N. W. 495

FILED JANUARY 20, 1939. No. 30501.

1. **Workmen's Compensation**: COMPENSABLE INJURY. Under the workmen's compensation law, an accidental injury to an employee is not compensable if it does not arise out of his employment or is caused by his "intentional wilful negligence." Comp. St. 1929, secs. 48-101, 48-127.
2. ———. It is a purpose of the workmen's compensation law to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his dependents from becoming a public charge.
3. ———: CONSTRUCTION OF LAW. "It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation." *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.
4. ———: NEGLIGENCE OF EMPLOYEE. Negligence of an employee while in the performance of duty, unless intentionally wilful, does not necessarily prevent compensation for his resulting injury or death.
5. ———: ———. Disobedience of an order by a person other than employer, directing an employee not to smoke in a gas-filled room, if the negligence of the employee is not wilful, does not prevent compensation for resulting injury.
6. ———: "WILFUL NEGLIGENCE." In the workmen's compensation law the word "wilful," in its relation to negligence of an employee while in the performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care but not necessarily amounting to wantonness but approximating it in degree.
7. ———: ———. An inveterate smoker of a pipe for 30 years, who lighted it with a match in a gas-filled room while in the performance of his duties as an employee, thus causing an explosion which resulted in his death, did not by his negligent act prevent his dependent widow from recovering compensation, where he responded automatically to the promptings of habit and desire without the volition essential to a wilful act of negligence, within the meaning of the workmen's compensation law.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem*, for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, sec. 48-101.

J. C. Moise, employee of the Fruit Dispatch Company, employer, defendant, was killed by an explosion of gas August 12, 1936. His dependent widow, Mabel Moise, plaintiff, presented to the compensation court a claim for compensation which was allowed. Defendant appealed to the district court for Lancaster county and there resisted the claim on the ground that the fatal explosion did not arise out of the employment but was caused by the employee's wilful negligence in lighting his pipe with a match in a gas-filled room to gratify a desire or to indulge pleasure personal to himself, though warned of the danger and such negligence forbidden. On issues raised by the claim for compensation and the defenses outlined, the cause was tried before the district court, where there were findings in favor of plaintiff who recovered judgment for $15 a week for 325 weeks from August 12, 1936, and for the following statutory items: Burial, $150; nurse, $3; hospital, $14; ambulance, $5; physician, $57. Defendant appealed to the supreme court.

Counsel for defendant vigorously argued at the bar and in the brief that the allowance of compensation cannot be sustained, because the accident did not arise out of the employment and was caused by the "intentional wilful negligence" of the employee, within the meaning of the workmen's compensation law. The statute makes it clear that an accidental injury to an employee is not compensable unless it arises out of his employment. Comp. St. 1929, sec. 48-101. Nor is it compensable if it was caused by his

"intentional wilful negligence." Comp. St. 1929, sec. 48-127. The defenses are based on the proposition that these issues, considered together, are established by the evidence in favor of defendant, the employer. Decisions from other jurisdictions are cited to sustain the position thus taken.

The solution of the problems presented depends upon a proper understanding of the evidence and its application to the issues within the meaning of the Nebraska compensation law. It was a purpose of that legislation to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his dependents from becoming a public charge. *Westcoatt v. Lilley,* 134 Neb. 376, 278 N. W. 854; *Tralle v. Hartman Furniture & Carpet Co.,* 116 Neb. 418, 217 N. W. 952; *Parson v. Murphy,* 101 Neb. 542, 163 N. W. 847. In a recent case it was said:

"It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation." *Wilson v. Brown-McDonald Co.,* 134 Neb. 211, 278 N. W. 254. Following *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797.

The Fruit Dispatch Company, defendant, was engaged in distributing bananas by rail in car-loads to wholesale dealers in fruits. Its principal office is in Boston, and it maintains offices in other cities, each in charge of a resident manager. J. C. Moise was the resident manager at Omaha and his trade territory included Lincoln. He had been employed in that capacity for nearly 30 years. It was his duty to receive orders, inspect shipments of bananas to customers upon complaint of damages or of quality and report the results of his inspection to the Boston office of his employer with recommendations on adjustments.

In response to a complaint by the customer, Grainger Brothers Company, wholesaler of fruit at Lincoln, that bananas in a shipment received from defendant were too green, Moise, resident manager at Omaha, went to Lincoln

August 12, 1936, to make an inspection. When he arrived the banana room in which the fruit was temporarily stored contained natural and ethylene gases to hasten ripening and to produce the color of bananas naturally ripened. Before making the inspection Moise was warned of the danger of explosive gas and directed not to smoke in the banana room. He entered it with the president of the Grainger Brothers Company, the foreman of the banana department and two employees. Within 10 minutes the fruit was inspected and the four men were at the door of the room about to depart, when an explosion of gas wrecked the banana room, killing Moise and three other persons and seriously injuring others. Defendant's understanding of the evidence is that Moise ignited a match to light his pipe, and thus caused the fatal explosion. Under the circumstances disclosed by the evidence, defendant states its position on one feature of the case as follows:

"An employee, who has been a resident manager for almost 30 years, familiar with the use of explosive gas in the banana-ripening process, who is warned just before entering the room not to smoke therein because the room is full of gas, but who, nevertheless, after entering, lights his pipe and causes an explosion which kills him, causes the explosion by an act performed for his exclusive personal enjoyment and the act cannot be said to arise out of the employment."

While there are rulings by other courts in harmony with the view entertained by defendant, the trend of precedents under the Nebraska statute is to the contrary. At the time of the accident Moise as resident manager was in his employer's trade territory, where his duties at the time called him. He was at the identical place where service was required. He had not completed the work in hand and was on his way to the office of defendant's customer to perform further duties for his employer. By lighting a pipe for his own pleasure or comfort he did not necessarily abandon for the moment his relation to his employer. An employee engaged in business transactions for his principal may light

a pipe and smoke for his own pleasure with his mind and efforts directed to the latter's business. In a recent case the court observed:

"There was no abandonment of the defendant's business while the employee was thus smoking, but the employee merely combined the defendant's business with the employee's private pleasure of smoking." *Triplett v. Western Public Service Co.*, 128 Neb. 835, 260 N. W. 387, citing *Rish v. Iowa Portland Cement Co.*, 186 Ia. 443, 170 N. W. 532, wherein the supreme court of Iowa said:

"Smoking, while not a necessity, is a recognized and quite universal habit among workmen, and an indulgence reasonably to be anticipated by employers. The lighting of a cigaret with a match is not in itself attended by the slightest hazard. It was rendered dangerous to plaintiff only by the presence of a powerful explosive in common use upon certain parts of defendant's premises. It may be that the officers of defendant were not negligent or to blame for the presence of the explosive in the building, but the right of the employee to compensation does not arise out of tort, but exists by reason of the provisions of the workmen's compensation act."

Disobedience of the order not to smoke in the gas-filled banana room did not sever the employee from his employment or remove him from the sphere of his duties. The warning and order were not given by the employer. The latter's customer could not change or terminate the relation of employer and employee. Moise of course was negligent after the warning, but negligence, unless intentionally wilful, does not prevent compensation authorized by statute. Mere disobedience of an employer's order, even, regarding the manner of performing duties, does not necessarily defeat compensation. *Volcheck v. Western Union Telegraph Co.*, 128 Neb. 502, 259 N. W. 371; *Hibberd v. Hughey*, 110 Neb. 744, 194 N. W. 859.

Was the employee's negligent act in lighting his pipe in the banana room intentionally "wilful" within the meaning of the workmen's compensation law? In the sense therein

used "wilful" means "deliberate act;" "such conduct as evidenced reckless indifference to safety;" "involves more than want of ordinary care;" "not necessarily amounting to wantonness but approximating it in degree." *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42.

The evidence does not disclose a motive for self-destruction of employee. On the contrary, it tends to prove he was in the midst of a happy married life that had lasted 30 years; had a son and a daughter; never had domestic or financial trouble; was earning $280 a month; had a pleasant, happy home; employment with the same employer extended continuously over a period of 30 years; was in performance of his duties as resident manager when fatally injured.

It was shown by uncontradicted evidence that he was an inveterate smoker of a pipe; smoked almost continuously, while awake, for 30 years or more; smoked while at work and at home. It is the proper inference from the facts that he carried on his person tobacco, pipe and matches and responded automatically to the promptings of habit and desire without the volition or mental effort essential to the intentional wilful act of negligence contemplated by the language of the statute. It necessarily follows that, by his negligence, he did not deprive his widow of compensation. The district court took these views of the facts and the law and the judgment responding thereto is

AFFIRMED.

FARMERS UNION LIVESTOCK COMMISSION ET AL., APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

283 N. W. 498

FILED JANUARY 20, 1939. No. 30266.

1. Carriers: RATES: REGULATION. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transportation of freight or passengers within the state. Comp. St. 1929, sec. 75-201.

2. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.
3. **Commerce: TRANSPORTATION RATES.** When, in the exercise of its constitutional and statutory powers, the interstate commerce commission finds that a disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce, and also determines what are reasonable rates for the interstate traffic and directs the removal of the discrimination, the carrier is entitled to put in force the interstate rates found reasonable and to remove the forbidden discrimination by bringing the intrastate rates to the same level.
4. **Carriers: RATES.** In such a case, where the state railway commission specifically adopts the rates and charges fixed by the interstate commerce commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.
5. ———: ———: **REPARATIONS.** The reparations statute, section 75-510, Comp. St. 1929, does not authorize the railway commission to retroactively condemn as unlawful a rate or charge previously established as lawful by it and subject a carrier which has conformed thereto to the payment of reparations measured by what the railway commission now holds it shou'd have decided in the earlier proceedings to be a reasonable and lawful rate.
6. **Constitutional Law.** A statute authorizing reparations under such circumstances is inhibited by the due process clauses of the state and federal Constitutions.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Dana B. Van Dusen, for appellants.

T. W. Bockes, T. F. Hamer, George C. Holdrege, J. W. Weingarten, Wymer Dressler, Robert D. Neely, Guy C. Chambers, W. P. Loomis and *D. M. Murphy, contra.*

Edwin Vail, amicus curiæ.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action at law brought by certain live stock commission firms in Omaha, or their attorneys in fact,

against all of the intrastate railroad carriers of live stock serving the stockyards at that point, to enforce the payment of reparations ordered by the Nebraska state railway commission based on the failure of the line haul or trunk railroads to absorb switching charges of the Union Stock Yards Company, or its successor, the South Omaha Terminal Railway Company, for switching car-loads of live stock from the terminals of the trunk lines to and from the loading and unloading chutes of the stockyards itself. The trial court found for the defendant railroad companies, and the plaintiffs appeal.

The record shows that, prior to 1896, the line haul carriers serving South Omaha owned their own trackage into the stockyards and no switching charges were assessed on shipments to and from those yards. Subsequently, the railroad carriers of live stock entered into an agreement with the Union Stock Yards Company whereby that company took over the tracks owned by the line haul carriers in so far as those tracks were within the stockyards district. Since that time the Union Stock Yards Company has operated as a common carrier, primarily for the purpose of serving the stockyards, and has established switching charges for the handling of traffic between the interchange tracks of the line haul carriers and the chutes within the stockyards. As a result of this change a switching charge of 50 cents per car-load of livestock was assessed, which charge was wholly absorbed by the line haul or trunk railroads. On December 8, 1908, the railway commission authorized the Union Stock Yards Company to collect a switching charge of 75 cents per car-load of live stock and ordered further that the line haul carriers absorb the whole charge. On September 16, 1910, the railway commission authorized the Union Stock Yards Company to increase the switching charge to $1 per car-load of live stock and ordered the absorption of the full charge by the line haul carriers. On June 12, 1918, the railway commission authorized an increase of the switching charge to $1.50 per car-load of live stock and ordered the line haul carriers to

show cause why they should not absorb the whole charge. It appears, however, that the control of the railroads had been taken over by the federal government on December 28, 1917, and no attempt was made by the railway commission to compel a complete absorption of the switching charge by the line haul carriers. On August 27, 1920, the interstate commerce commission authorized a 35 *per centum* increase in all interstate rates. The Nebraska railway commission took similar action, but allowed a 25 *per centum* increase only on intrastate rates. On January 27, 1921, the interstate commerce commission ordered all steam railway carriers in Nebraska to comply with its order for a 35 *per centum* increase of freight rates for the reason that the Nebraska rates were discriminatory as against the interstate rates, making the switching charge of the Union Stock Yards Company $2 per car-load of live stock and the line haul carriers amount of absorption $1.50, leaving a balance of 50 cents per car-load of live stock to be paid by the shipper or receiver of the stock. On July 1, 1922, the switching rates along with all other freight rates were reduced approximately 10 *per centum,* making the new switching charge $1.82 per car-load of live stock, $1.35 of which was absorbed by the line haul carriers and 47 cents passed back to the shippers and receivers of live stock. By a decree of the United States district court, the Nebraska state railway commission was enjoined from enforcing sections of statutes and rules in conflict with the foregoing orders of the interstate commerce commission. Thereafter, and on May 5, 1922, the railway commission vacated its order increasing freight rates 25 *per centum,* and its orders supplemental thereto, expressly stating that the intrastate rates then in force should remain in effect until changed by a subsequent order of the commission. On May 3, 1924, the railway commission, after a complete investigation of the freight rate structure in Nebraska, entered its permissive order that all freight charges be based on distances from the points of origin to final destination. The opinion of the railway commission accompanying the order states:

"Distances to South Omaha stockyards shall govern the rates." On September 1, 1932, the railway commission, without entering an order, found the new rates to the Missouri river markets prescribed in the "Interstate Commerce Commission Docket 17000, Rate Structure Investigation, Part 9, Livestock—Western Division Rates," a copy of which is in the record, as reasonable maximum rates and that they should include delivery to the unloading chutes of the Union Stock Yards Company without the assessment of the additional switching charges. The effective date of this order was, upon application, postponed until November 1, 1932. It was therefore definitely ordered under the new rates effective November 1, 1932, whether interstate or intrastate, that line haul carriers were to absorb the full amount of the switching charge.

It is not contended by the parties that the switching charge of $1.82 per car-load of live stock is an unreasonable charge for the service and facilities furnished. The allegation of unreasonableness is based wholly upon the failure of the line haul carriers to absorb this entire charge out of line haul rates; in other words, upon the view that the line haul rates are unreasonable in amounts equal to the unabsorbed portion of the switching charge, in that they do not cover all transportation service to and from the loading and unloading chutes in the South Omaha stockyards. Plaintiffs further contend that the orders of the railway commission requiring the use of distances to the South Omaha stockyards necessarily contemplated the handling of stock to and from the loading and unloading chutes solely on the basis of the line haul rates. It is upon this basis that plaintiffs asked, and the railway commission granted, reparations to the extent of 47 cents per car-load of live stock shipped in and out of the South Omaha stockyards under the provisions of section 75-510, Comp. St. 1929. The period during which reparations must be paid, if liability therefor attaches, the number of car-loads of live stock shipped in and out of South Omaha stockyards, and the amounts owing if the defendants are liable,

are all stipulated in the record. The present action was brought only for the sum of $318.19 on a very few of the shipments involved in the order of the railway commission, these being selected in such a way as to lay the foundation for the determination of every issue involved in the commission's order. Plaintiffs estimate, and the defendants agree, that total reparations, with interest, if defendants are liable therefor, will amount to approximately $175,000. The question for determination in this suit is whether the trial court rightfully denied a judgment for reparations based on the order of the railway commission requiring their payment.

That the stockyards company is a common carrier has been heretofore determined. *State v. Union Stock Yards Co.*, 81 Neb. 67, 115 N. W. 627. Under the Nebraska regulatory act, section 75-403, Comp. St. 1929, it is not unlawful for the railway commission to allow charges in excess of the line haul rate for terminal service and facilities, the statute in part saying: "The schedules shall plainly state the places upon its road between which property and passengers will be carried, * * * stating separately any terminal charges, and any rules and regulations which in anywise change, affect or determine any of the aggregate of such rates, fares and charges." To like effect is the interstate commerce act as passed by the federal congress. 49 U. S. C. A., sec. 6, par. 1. It seems to us, therefore, that the fixing of a line haul rate does not of itself include the cost of terminal services and facilities and whether it does or not must be determined from the orders of the railway commission establishing such rates. See *Walker v. Keenan*, 73 Fed. 755; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320.

The source of the difficulty resulting in this litigation was the act of the federal government in taking over the control of the railroads on December 28, 1917. Prior to that date all line haul rates fixed by the railway commission on intrastate shipments included the whole of the switching or terminal charge of $1 per car-load of live

stock. At the commencement of federal control the switching charge on interstate shipments was $1.50 per car-load of live stock, 75 cents of which was absorbed by the line haul carrier. On June 12, 1918, the railway commission authorized the Union Stock Yards Company to increase its switching charges to $1.50 per car-load of live stock on intrastate shipments and ordered the railroads to show cause by June 24, 1918, why they should not be required to absorb the whole of the increased switching charge. Due to the fact that the railroad properties were being operated by the director general of railroads, no further order was made with reference to the absorption of the switching charges by the line haul carriers. The increased switching charge of $1.50 per car-load was duly put into effect and remained in effect all during the period of federal control which ended on February 29, 1920. During this period the railroads absorbed $1 of the switching charge on intrastate shipments and 75 cents of the switching charge on interstate shipments. The balance of each charge was collected from the shipper or consignee of the live stock.

The period of federal control was terminated on February 29, 1920, by an act of congress which provided in part: "All rates, fares, and charges, and all classifications, regulations, and practices, in anywise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the interstate commerce act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the commission." 41 U. S. St. at Large, Part I, p. 464. Pursuant to the power reserved to it in this act, the interstate commerce commission, effective August 27, 1920, authorized a 35 *per centum* increase in

rates on interstate traffic and specifically authorized such increase to apply to switching charges. On August 23, 1920, the Nebraska railway commission denied a 35 *per centum* increase and ordered a 25 *per centum* increase only. The order, however, contained the following provisions: "It is further provided that (d) intrastate switching and special service (such as transit, weighing, diversion, reconsignment, storage, car rental and transfer) charges shall be increased twenty-five (25) per cent., provided that all existing absorption rules will be applied to the advances herein authorized." Thereupon the interstate commerce commission found that the increase of 25 *per centum* on intrastate traffic was discriminatory as to interstate commerce, and pursuant to the authority of section 13, par. 4, 49 U. S. C. A., ordered the 35 *per centum* increase of rates to be made. See, also, *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563. The order of the interstate commerce commission was sustained by the United States district court for the district of Nebraska and the rates therein established were made effective. Under this order the switching charge on intrastate car-loads of live stock was $2 per car, $1.50 of which was absorbed by the line haul carrier. The switching charge on interstate car-loads of live stock was $2 per car, $1.25 of which was absorbed by the line haul carriers. These rates and charges were included in the tariffs published by the defendant railroad companies, copies of which were filed with the Nebraska railway commission and the interstate commerce commission.

On May 5, 1922, the Nebraska railway commission entered an order containing the following: "It is therefore ordered that the order made and entered in this cause on August 23, 1920, as modified by supplemental orders hereinbefore made, be, and the same is hereby vacated and set aside, thereby leaving the intrastate rates now in effect as lawful rates until hereinafter changed pursuant to order of this commission."

On May 24, 1922, the interstate commerce commission entered its order with reference to the order of the Nebraska railway commission under date of May 5, 1922, in part as follows: "*And it further appearing,* That by order entered April 7, 1922, as modified by order dated May 5, 1922, the Nebraska state railway commission has vacated and set aside its order of August 23, 1920, as modified, so as to authorize the Nebraska carriers to charge and collect on Nebraska intrastate traffic the full increases allowed by this commission in said docket Ex Parte 74, now in effect; and that the increased intrastate rates and charges prescribed by and established pursuant to the aforesaid orders heretofore entered by this commission will, if said orders of this commission be vacated in so far as they pertain to rates and charges for the transportation of freight, continue in effect as to the lawfully established and applicable intrastate rates and charges unless and until changes by further affirmative order of the competent authority of said state."

It seems to us therefore that the Nebraska railway commission, by its order of May 5, 1922, acquiesced in and adopted the rates promulgated by the interstate commerce commission and that the railroad companies were at this stage of the proceedings lawfully absorbing $1.50 of the $2 switching charge on each intrastate car of live stock and lawfully collecting 50 cents of the charge from the shipper or consignee. This is further borne out by the decree of the United States district court sustaining the intrastate rates established by the interstate commerce commission, wherein it states that the rates in question "are now lawfully in effect by virtue of the supplemental order of the Nebraska state railway commission in Application No. 4299, dated May 5, 1922."

On June 23, 1922, the railway commission authorized the railroads in Nebraska, effective July 1, 1922, to decrease their freight rates to correspond with decreases which had been authorized by the interstate commerce commission as shown by its order. The interstate commerce commis-

sion had ordered that the rates in effect be reduced so they would exceed the rates in effect on August 26, 1920, by 21.5 *per centum* instead of 35 *per centum*. In its order the railway commission said: "It is the intention of this order, and it shall be so construed, to permit Nebraska carriers, applicants in this case, to amend rates and charges on intrastate freight traffic in the same general manner and to the same extent as shall take place in complying with the findings of the interstate commerce commission." Clearly, this order authorized an increase in the switching charge of $1.50 per car in effect August 26, 1920, by 21.5 *per centum*, thereby fixing the switching charge at $1.82. On July 1, 1922, all railroads except the Union Pacific Railroad Company published tariffs by which they absorbed $1.35 of the switching charge, leaving the remaining 47 cents to be collected from the shipper or consignee. The Union Pacific Railroad Company provided in its published tariff of the same date for an absorption of $1.32 of the switching charge, leaving 50 cents per car-load to be collected from the shipper or consignee. On May 19, 1926, the Union Pacific Railroad Company applied for an order increasing the absorption on intrastate shipments from $1.32 to $1.35. On the same date, the railway commission entered its order authorizing the increase of the amount of the switching charge to be absorbed to $1.35 per car-load of live stock. There can be no question that the railway commission was fully aware of the amount of the switching charge and the amount being absorbed by the line haul carriers. The order of May 19, 1926, shows that the railway commission considered the switching charge and the amount of absorption as a fixed rate by the commission by virtue of its order of May 5, 1922, when it accepted the rates then in effect as lawful rates, and its order of June 23, 1922, authorizing a reduction of intrastate rates to the same extent that they had been reduced by the interstate commerce commission. The rates thus established remained in effect until November 1, 1932, when an entirely new rate scale was established on both intrastate

and interstate shipments of live stock based on the distance from the point of origin to the point of destination. The rates prescribed, effective as of November 1, 1932, specifically provided that the entire switching charge should be absorbed by the line haul carrier.

We conclude, after an examination of all the orders of the railway commission on the subject, that the amount of the switching charge absorbed by the defendant companies here complained of was done upon the legal orders of the railway commission. Appellants contend that an order of the railway commission entered on May 3, 1924, and known as Resolution 74, required the absorption of the whole of the switching charge on intrastate shipments. It is true that this purported order stated that "Distances to South Omaha stockyards shall govern the rates." But it will be observed from a reading of Resolution 74 that it was merely permissive in character and not an order fixing a rate having the force and effect of a statute. The order states in part:

"It is expected that the carriers will publish specific rates from the respective points of origin to final destination and not merely a distance scale. The scales here set forth are not intended for such rigid application as would prevent meeting short line, or reasonable cross-country, competition.

"No order will be entered at this time for the reasons heretofore set forth. These findings are sufficient warrant for the carriers to publish out on statutory notice rates in accordance with the scales attached hereto in appendix. It is expected that the rates will be published to be effective on or before July 20, 1924. If such publication is not made the commission will reopen the case for such proceedings as are appropriate."

It will be noted the commission's opinion states that no order will be entered at this time and that if the recommended publication is not made the commission will reopen the case for such proceedings as are appropriate. The case was never reopened and no subsequent action was ever

taken thereon. It is contended that all rates and charges established pursuant thereto must be treated as carrier made, and if found to be unreasonable by the railway commission, the railroads could be subjected to the payment of reparations. We think this is true, but the fact remains that nothing was said in the order about the absorption of switching charges, and in view of the fact that the amount of the absorption was not changed by the carriers after the making of the permissive order, we are obliged to hold that it was governed entirely by the commission made order previously made. We necessarily conclude that Resolution 74 is not an order that was binding upon the railroads as a rate or charge fixed by the commission. As we have stated, it was permissive, but not an order entitled to the force and effect of a statute.

To specifically set forth every contention advanced by the appellants in their attempt to show that the switching charges in question were never fixed by the railway commission would require an indeterminable amount of space in this opinion. We must, by necessity, content ourselves with the statement that the record and briefs have been examined as to each point raised and a finding that the partial absorption of the switching charges was not authorized by the railway commission cannot be sustained. The further consideration of the case must therefore be bottomed on the premise that the partial absorption of the switching charges complained of was a rate or practice approved by, and, in effect, ordered by the Nebraska railway commission.

This court is committed to the rule that a rate put into effect by order of the railway commission has the force of a statute on the subject. Unless held to be unreasonable and arbitrary by the courts, it expresses the only reasonable rate governing the subject-matter contained in the order. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.*, 129 Neb. 726, 262 N. W. 852; *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370. In other words, the absorption of $1.35 of the $1.82 switching charge and

the collection of the balance of 47 cents from the shipper or consignee was a legally and conclusively established legal rate or practice prior to November 1, 1932. It is not disputed that the railway commission's order of November 1, 1932, required the absorption of the whole switching charge by the line haul carriers. The question is whether, under such circumstances, the railway commission properly allowed reparations under section 75-510, Comp. St. 1929.

The reparations statute, section 75-510, Comp. St. 1929, is as follows: "That if, after hearing on a complaint under sections 6126, 6127, 6128, 6129 or sections 6137, 6138, 6139, 6140, Revised Statutes of Nebraska for 1913 (75-501 to 75-504, 75-506 to 75-509), the Nebraska state railway commission shall determine that any party complainant has on and after the taking effect of this act and within two years next preceding the filing of the said complaint paid unjust or unreasonable rates or charges to any defendant railroad or express company in this state on intrastate traffic or has on and after the taking effect of this act and within two years next preceding the filing of the said complaint suffered damages by reason of the maintaining, publishing, demanding, charging, receiving or retaining by such carrier of any rate or rates, charges, rules, regulations, services or practices on intrastate traffic which are found by the commission to be unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful, the commission shall make an order directing the railroad or express company to pay to the complainant the sum to which he is entitled on or before a day named."

It will be noted from the foregoing statute that reparations can be allowed only where it was found that the shipper had paid unreasonable or unjust rates or when the complainant suffered damages by reason of the collection of unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful rates or charges by the carrier. But the rate, or charge, or practice, whichever it may be in the instant case, was not unreasonable, unjust or unlawful, because the railway commission had

by action previous to its collection determined the contrary. Its action in so doing was equivalent to a legislative enactment on the subject. This being true, the railway commission was without authority to grant reparations.

There is a further reason why the plaintiffs cannot recover in this case. If section 75-510, Comp. St. 1929, could be construed to authorize the railway commission to retroactively condemn as unlawful a rate or charge previously established as lawful by it, it would amount to a taking of the property of the railroads without due process of law, a procedure inhibited by section 3, art. I, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States.

In *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, the court said: "Where the commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the commission now holds it should have decided in the earlier proceedings to be a reasonable rate." In the hearing of the same case in the circuit court of appeals, 49 Fed. (2d) 563, the court very aptly said: "The only constitutional restriction upon the legislative power to retroactively reduce rates suggested by the appellant is the constitutional prohibition against the taking of property without due process of law. That is, it is argued, the commission, having established a legal and lawful rate, the freight charges thus fixed, allowed and collected become the property of the carrier and cannot by a new retroactive law be arbitrarily taken away by legislative fiat. This position seems to be well taken. * * * That is to say, whether we regard the power of the commission in establishing a just and reasonable rate as a basis of reparations as a judicial power or as a legislative power, in either event

rates established by the legislative power and collected by the carrier cannot be taken from it because it is subsequently determined to be excessive, whether the belated determination is by court or legislature, or, to use the phrases more commonly applied to the acts of the commission, whether such subsequent determination is quasi legislative, administrative or quasi judicial—in either event a rate established by law—lawful when charged, remains lawful when attacked later by the shipper. The view we have expressed is supported by all the decisions of state courts construing laws establishing rate-regulating bodies having power to grant reparations for excessive rates charged by the carrier."

In *T. R. Miller Mill Co. v. Louisville & N. R. Co.*, 207 Ala. 253, 92 So. 797, the court said: "Such a practice would be odious to the generally established notions of justice, and would, moreover, be utterly subversive of the policy and utility of any system of rate regulation; for no rate could be relied upon as stable, and neither carrier nor shipper could ever be certain of the basis upon which business was being conducted. For it must be observed that, under such a practice, the commission would just as well find that a rate approved and imposed by it years before was in fact unreasonably low, and give retroactive operation to the higher rate later found to have been reasonable. Of course no such practice was contemplated, and no such power was vested in the commission."

Also, in *St. Louis-S. F. Ry. Co. v. State*, 155 Okla. 236, 8 Pac. (2d) 744, the court said: "The question before us, then, is whether or not, after the commission has made a rate, and it has been complied with by the carrier, and the goods hauled, and the collections made, it can later decide that the original rate allowed was excessive and require the carrier to refund. Natural justice would seem to require a negative answer."

In holding portions of a Kansas reparations statute invalid, the supreme court of that state said: "And to the extent that section 4 is designed in text and terms to

create a basis for a cause of action in behalf of a shipper for the exaction of a rate which the carrier was bound to charge under compulsion of statute, breaches of which were punishable by criminal prosecution, it violates the vested rights of the carrier under the provisions of the fourteenth amendment; it likewise offends against those orderly rules and principles for the administration of justice which constitute due process of law; and it is therefore unconstitutional and void." *State v. Public Service Commission,* 135 Kan. 491, 11 Pac. (2d) 999.

It seems quite apparent to us that the railway commission is without authority to set aside a rate or charge previously fixed by it on the ground that it is unreasonable as now viewed and proceed to grant reparations. Such a rate or charge is the reasonable, just and legal rate or charge until abrogated by the railway commission, or other competent authority, and an award of reparations based on the unreasonableness of such rate or charge is not authorized by section 75-510, Comp. St. 1929.

Appellants contend that the failure of the railroads to appeal from the reparations order made by the railway commission in which it was determined that failure to absorb the whole switching charge was an illegal practice has made that part of the commission's order conclusive. It is not necessary for us to decide the effect of the failure of the railroads to appeal. The fact remains that the railway commission did not have authority to grant reparations under the facts in this case. This being true, the commission's order purporting to so do is void. When the district court was called upon to enforce the railway commission's order for reparations, it had jurisdiction to inquire into the power of the railway commission to enter such an order. The trial court determined that the reparations order was invalid and in this it was correct. In view of the conclusion reached, it is not necessary for us to discuss or pass upon the other points raised in the briefs by the parties to the suit.

The judgment of the district court is

AFFIRMED.

CHARLES J. MCILWAIN, APPELLANT, V. MARGARET K. MCILWAIN, APPELLEE.
283 N. W. 845

FILED FEBRUARY 10, 1939. No. 30460.

1. **Divorce**: ALIMONY. A hearing upon an application to revise and alter an alimony decree, brought under the provisions of section 42-324, Comp. St. Supp. 1937, is not a retrial of the original case, nor a review of the equities of the original decree. The court upon such application considers the new or changed conditions of the parties and adapts the decree thereto, as present conditions require.
2. ———: ———. Remarriage is a change of circumstance that may be considered by the court, along with other changes of circumstances, in passing upon an application to revise and alter an alimony decree.
3. ———: ———. Remarriage does not relieve a husband from the obligations fixed by an alimony decree.
4. ———: ———. Where a divorced husband remarries, he owes a duty to his second wife, as well as to the former, that the law recognizes, and the court will make such adjustment as the relative necessities of the parties demand and the ability of the husband will warrant. However, the first wife has first consideration, and her necessities will not be unreasonably curtailed, nor her wants ignored.
5. **Evidence** examined, decree modified, and as modified affirmed.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed as modified.*

Frank A. Peterson, for appellant.

S. W. McKinley, Jr., contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

This is a proceeding brought under the provisions of section 42-324, Comp. St. Supp. 1937, to revise and alter a decree fixing permanent alimony.

The plaintiff and the defendant were married April 5, 1905; three children were born to the marriage; the youngest will become of age March 10, 1939. The plaintiff

is 60, the defendant 58, years of age. The plaintiff and the defendant resided in Nebraska until 1921, when, apparently with the plaintiff's approval, the defendant with the three children removed from Nebraska to California, where she and the three children have since resided.

Shortly after the marriage, residence property was bought in Omaha by the plaintiff and the defendant, title being taken in the wife's name, part of the purchase money being furnished by the defendant's father. This property was sold, and a second property bought, in part with a contribution from the estate of the defendant's father. This was profitably sold, and the proceeds thereof were taken by the defendant to California where, apparently using her own discretion and judgment, she invested and reinvested the money, sometimes with profit, sometimes with loss.

In April, 1933, the plaintiff brought an action for divorce against the defendant, alleging in his amended petition the incompatibility of the defendant and desertion of the plaintiff by the defendant. The defendant answered, admitting the marriage and denying all other allegations in the petition. At the trial of the divorce action, the defendant appeared by her attorney, introduced no evidence, and made no objections to the introduction of evidence. A decree granting the plaintiff an unconditional divorce on the ground of the defendant's desertion was entered November 1, 1933. On that date there was also filed with the clerk of the court a stipulation, dated May 10, 1933, providing, among other things, that, upon the signing of a decree in this action, if one was granted, regardless of who obtained the divorce, alimony should be settled as follows: Plaintiff to pay the defendant the sum of $75 per month until the younger son reached the age of 21 years; that thereafter the defendant was to be paid the sum of $40 per month; and that there should be incorporated in the decree the terms and conditions of the stipulation.

In the decree the court found "That the stipulation entered into between these parties is fair and reasonable, and considering the present earning capacity of the plain-

tiff and the circumstances of the parties, should be made binding upon them;" and decreed "That the terms of a stipulation entered into between these parties be binding upon the same;" and provided for the payment of $75 per month by the plaintiff to the defendant until the younger son became 21 years of age, and that "after said date the plaintiff is to pay the defendant the sum of $45 per month." Indorsed upon the stipulation is the following: "With alimony for defendant increased to $45 per mo. after son Laurence becomes of age. Stipulation approved." To that appears the signature of the trial judge.

On December 10, 1937, plaintiff filed his petition in said action, reciting the above decree, compliance therewith, his remarriage, a reduced earning capacity; that he has no property except his earnings; and praying for a decree altering and modifying said alimony decree by reducing the payments of $75 per month to a sum not exceeding $25 per month until the younger son becomes 21 years of age; and providing that thereafter all payments of alimony cease.

The defendant answered, alleging that the payments provided for in said decree were based upon a stipulated property settlement; that the same became binding upon the parties; that there has been no change of position of the defendant since said decree; setting out her property holdings; alleging the capacity of the plaintiff to continue said payments; and praying that the stipulated contract in said decree remain unaltered and unmodified; and that the terms thereof should be carried out in their entirety.

The matter was heard upon March 5, 1938. The trial court found "that the evidence does not disclose any substantial change in the circumstances of the parties," and denied a modification of the alimony payments "except that the modification of the original stipulation be and the same hereby is canceled;" and ordered that "the original stipulation providing for payments of $40 per month after the majority of the youngest child is hereby confirmed."

At the time of the hearing in the trial court, of the three children, the daughter was married and well-to-do; the

older son was unmarried, living at home, and well-employed; and the younger son was finishing high school and had the promise of a good job. The real estate owned by the defendant consisted of a small apartment house in which she lived, the rent of which, however, was collected by the loan company which held a mortgage upon it. She had no other income and was not in good health. It appeared, also, that the younger son had saved some money from the payments made under the court order by his father. The plaintiff had no property of any kind save a cheap automobile purchased in 1936, upon which full payment had not yet been made at the time of trial. During the twelve years before the divorce that the defendant resided in California with her children, the plaintiff contributed to their support a total of $21,000 from his earnings as a freight engineer; and at one time gave the defendant $500 to be used as the purchase price of property. The defendant has the residue of the property resulting from the contributions of her father and from the earnings of the plaintiff.

The record shows some dispute as to the present earnings of the plaintiff. The plaintiff testified that he was earning around $275 a month when the decree was entered in 1933. The record does not disclose whether the sum fixed for his 1933 earnings of $275 a month was net or gross. He testified he was earning around $190 to $200 when the case was tried in March, 1938. His gross earnings shown for February, 1938, alone, were around $217. His gross earnings for the year 1937 were $3,525.38, from which approximately $30 a month for road expenses should be deducted. He fixed his monthly expenses at the time of the trial at about $290, which included the alimony payment. His only disclosed income at the time of the trial, other than earnings, was $10 a month from a stepdaughter. He listed no debts other than those on his car, so we conclude his current income was sufficient to meet his current expenses, and that there has been no substantial reduction in his earnings since 1933. The terms of plain-

tiff's employment make him subject to voluntary retirement at the age of 65 with a pension of $92 or $93 per month according to present figures; and he is subject to compulsory retirement at 70 with a pension of about $110 per month. However, this contingency will not occur for five years at the earliest.

We first consider the effect of the stipulation as disclosed by the record in this case. We do not have the testimony, with reference to the property of the plaintiff or his earnings, at the time of the trial of the action for divorce other than his statement at the time of the hearing in 1938. However, the court in its findings considered "the present earning capacity of the plaintiff and the circumstances of the parties." So, we assume, that evidence was taken upon that question, and that the trial court, upon the basis of evidence offered at that time, had reason for increasing the stipulated amount to be paid to the defendant from $40 to an award of $45 per month after the youngest child became of age. However, that increase was not to become effective until March, 1939.

We agree with the statement made by defendant's counsel that "said decree was entered, in part at least, upon a stipulation between the parties." The effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court.

We view the case, then, from the standpoint of a decree entered providing for the payment of alimony, which decree is subject to revision and alteration from time to time by the court upon a proper petition therefor and proper showing thereon.

The applicable provisions of section 42-324, Comp. St. Supp. 1937, are as follows:

"After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof. * * * And the court may make any decree re-

specting any of the matters which such court might have made in the original suit."

In the original suit the court has power to decree such alimony "as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." Comp. St. 1929, sec. 42-318.

The power of the court to alter and revise provisions for alimony in a divorce decree is unquestioned. We have examined the decisions of this court in *Chambers v. Chambers*, 75 Neb. 850, 106 N. W. 993; *Cizek v. Cizek*, 76 Neb. 797, 107 N. W. 1012; *Williams v. Williams*, 119 Neb. 8, 226 N. W. 798, together with those of other jurisdictions having statutes exactly alike or similar to ours. We conclude that a hearing upon an application to revise and alter a decree under this statute is not a retrial of the original case, or a review of the equities of the original decree. The court upon such application considers the new or changed conditions of the parties and adapts the decree thereto, as present conditions require. The remarriage of the plaintiff, the establishment of a new home, and the support of a stepson, aged 15 years, are the only material changes of circumstances shown by this record. Remarriage, and the resulting new obligations, is a change of circumstance that may be considered by the court, along with other changes of circumstances, upon an application to revise and alter the original decree.

The plaintiff, at the time he secured the divorce from the defendant, consented to an alimony decree fixing payments of $75 a month to his wife up until the time the minor son became 21 years of age, and thereafter at $40 a month. It is true that the trial court at that time increased the award payable after the majority of the younger son. That increase, however, is not yet effective, and the trial court in its decree of March 11, 1938, reduces the amount payable after the majority of the younger son to $40 per month. The plaintiff knew at the time of his remarriage that he was under obligations to satisfy the decree that

the court rendered against him. His remarriage does not relieve him from the obligations fixed by that decree. *Winter v. Winter*, 95 Neb. 335, 145 N. W. 709. "Where a divorced husband remarries, he owes a duty to his second wife, as well as to the former, that the law recognizes, and the court will make such adjustment as the relative necessities of the parties demand and the ability of the husband will warrant." *Cook v. Cook*, 168 Wash. 649, 13 Pac. (2d) 38. However, the first wife has first consideration, and "her necessities will not be unreasonably curtailed, or her wants ignored." *Herrett v. Herrett*, 80 Wash. 474, 141 Pac. 1158.

So far as this record discloses, there has been no material change in the earning capacity of the plaintiff since the original decree was entered, and the affirmation of the decree of the trial court places no burden upon the present wife that was not there at the time of her marriage to the plaintiff. Under the facts and circumstances disclosed by the record in this case, the fact of remarriage standing alone is not sufficient to justify a modification of the original decree, or a reduction in the amount of alimony that the plaintiff should pay the defendant.

Plaintiff submits that decrees for alimony in instalments for life or for an indefinite period are invalid in the state of Nebraska. Plaintiff's contentions in that regard have been answered by this court in *McCord v. McCord*, 128 Neb. 230, 258 N. W. 474, wherein this court said: "We find nothing restricting the powers of our divorce courts, in a proper case, to enter judgments in this form."

The stipulation was offered for use in the divorce action in 1933, and should not have been confirmed in this proceeding.

The decree of the district court of March 11, 1938, is modified by setting aside that part of the decree which holds that the original stipulation is confirmed, and, so modified, is affirmed, subject to the right of the plaintiff to apply for and secure modification thereof at a subsequent time upon a showing of materially altered circumstances.

The costs of this action on this appeal are taxed to the plaintiff, including an attorney's fee of $100 for defendant's attorney for services in this court.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF CHRISTIAN M. SKADE.
HANNAH EDWARDS, APPELLANT, V. ANNA D. YORK ET AL., APPELLEES.
283 N. W. 851

FILED FEBRUARY 10, 1939. NO. 30452.

1. **Appeal.** In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts.
2. **Contracts.** The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract.
3. **Work and Labor.** A presumption that an adult child who performed valuable services for her parents in their home and on their farm did so gratuitously may be overthrown by evidence of an oral contract for compensation.
4. **Payment.** A presumption that a lender of money is not indebted to the borrower on a previous obligation not mentioned by either at the time of the loan may be overthrown by evidence of a preexisting debt owing from lender to borrower.
5. **Limitation of Actions.** The statute of limitations does not begin to run against the claim of an adult child for services continuously performed under an oral contract for parents during their lives until the contract is terminated by their death.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed.*

R. E. Bannister and *Herbert W. Baird*, for appellant.

Halligan, McIntosh & Halligan, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

In the county court of Dawson county, Hannah Edwards presented a claim of $11,800 against the estate of her deceased father, Christian M. Skade, for services performed by her from January 1, 1904, to January 30, 1937, under an agreement by him to pay her therefor; also a claim for an unpaid loan of $500 from her to her father April 2, 1934; total, $12,300.

Anna D. York and Elsa M. Rickey, daughters of decedent and sisters of claimant, contestants, objected to the allowance of the claims, pleading *nil debet*; no such agreement; attempt to annul duly probated will of decedent; statute of limitations. The county court disallowed the claims. From a dismissal of the proceeding claimant appealed to the district court, where there was a trial on the issues raised by the pleadings in the county court. At the close of the testimony on behalf of claimant, the district court sustained a motion by contestants to direct a verdict in their favor for insufficiency of the evidence to prove the claims. From the resulting judgment in favor of contestants, claimant appealed to the supreme court.

The vital issue on appeal is the sufficiency of the evidence to make a case for the determination of the jury on the traversed plea for compensation for services performed by claimant under an agreement by her father to pay her for them. The problem requires observance of this rule: In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts. *Central Nat. Bank v. Ericson,* 92 Neb. 396, 138 N. W. 563; *O'Hara v. Hines,* 108 Neb. 74, 187 N. W. 643; *Diller v. Chicago, B. & Q. R. Co.,* 119 Neb. 494, 229 N. W. 888; *Phelps v. Metropolitan Utilities District,* 120 Neb. 337, 232 N. W. 785; *State v. Havel,* 120 Neb. 832, 235 N. W. 584; *In re Estate of Hoagland,* 126 Neb. 377, 253 N. W. 416; *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W.

695; *Andrews v. Clapper,* 133 Neb. 110, 274 N. W. 209; *Zimmer v. Brandon,* 134 Neb. 311, 278 N. W. 502.

The evidence establishes or tends to prove the following facts: Hannah Edwards, claimant, is the daughter of Christian M. Skade and wife, who had two other daughters, Anna D. York and Elsa M. Rickey, and two sons, Mats Skade and Henry C. Skade. Hannah's husband died January 24, 1904, leaving her with their only child, a girl three years of age. After the funeral, the father of Hannah took her and her child to his "home place," a 160-acre farm in Dawson county. When they arrived, there were present herself and her daughter, her father and mother, her sister Elsa, her brothers Mats and Henry, and Henry's wife who had become a mother the day before. For two weeks Hannah acted in the capacity of accoucheuse besides the performance of other services in her father's home. Henry's wife remained there until the next fall.

For 33 years Hannah, without receiving any compensation, in money, worked in the home of her father continuously, except at intervals when temporarily absent or prevented by illness. In the meantime the residence of the senior Skade was first on the south place, later on a 160-acre farm a short distance farther north, and finally on a lot in Cozad, where a house was constructed for the third home. At these homes roomers and boarders were kept at different times for compensation and visiting relatives were frequently entertained at each of those places.

The health and strength of Hannah's mother had been somewhat impaired by sunstroke and other afflictions and she did not perform many of the tasks incident to farm and home life. The more difficult services were performed by Hannah, who cooked, cleaned house, did the family washing, painted buildings, husked corn, milked cows, pumped water for hogs, took care of chickens, fed calves, worked in the garden. Services like those indicated were performed by Hannah on both farms. She put the house on the north farm in order for occupancy by the Skade family. She papered the Skade house in Cozad.

Hannah was not a dependent in 1904 when her father took her and her little daughter into his home, nor afterwards. She had been emancipated by marriage, age and separation from former relations. She had the income from a 40-acre tract of irrigated land which yielded her an annual income varying from $200 to $1,500. With her earning capacity for work she had the means of livelihood. She clothed herself and daughter until the latter became a self-supporting teacher.

In addition to the natural impulse of the father to care for his daughter after the death of her husband in 1904, there were inducements to take her into his home. He was then in need of a midwife for a daughter-in-law and also in need of a housemaid. Hannah acted in both capacities.

If there were any agreement to pay and receive compensation, performance on the part of the daughter is fully shown. In addition to facts already stated, the father himself, according to the testimony of a disinterested witness, said that Hannah could do a man's work; did not see how they could have gotten along without her; had done more for him than all the rest of them—referring to members of his family.

Is there evidence from which a jury could properly find that an agreement for pay was made? Hannah was not permitted to testify to transactions between herself and her deceased father. This handicap increased the difficulty of proving an oral contract for compensation. Resort to circumstances was necessary. A witness who testified with apparent candor, who had been a teacher, who was a neighbor and friend of the elder Skade, said the latter told him that Hannah had promised to stay with him and his wife and take care of them; that "he had always promised to pay her;" that he "intended to leave it in a will that she was to get it, but he was informed the will could be broken and he had decided she should just hand in for her labor for the time she had worked for them;" that he said to the witness: "You might have to repeat this some time."

The circumstances; the promise of Hannah to stay with her father and mother and take care of them; the promise of the father to pay for the services; the fidelity with which Hannah kept her promise for a third of a century, and the satisfaction she gave him by the faithful performance of duties—all tend to prove a mutual agreement for compensation, unless there is something in the record to overturn the case thus made.

A copy of the duly-probated will of the senior Skade is in the record. It is dated June 12, 1936, and willed in equal shares to the three daughters of testator the estate of which he died seised, except household goods and chattels bequeathed to Hannah. By will the two sons got nothing, because one of the farms had been sold and they had received proceeds of the sale amounting to $21,000.

The will made no provision for compensating Hannah for her labor, and it is argued in support of the peremptory instruction that the allowance of her claim would consume the estate and defeat the devise to the daughters Anna and Elsa. There was a formidable argument in support of this proposition, but it does not seem to be conclusive on the record for review. It has long been the law in Nebraska that the making of a will which violates unperformed obligations of testator under valid oral contract, after full performance by the other party, does not destroy the contract. *Peterson v. Bauer,* 83 Neb. 405, 119 N. W. 764; *Hespin v. Wendeln,* 85 Neb. 172, 122 N. W. 852; *O'Connor v. Waters,* 88 Neb. 224, 129 N. W. 261; *Johnson v. Riseberg,* 90 Neb. 217, 133 N. W. 183; *Brown v. Webster,* 90 Neb. 591, 134 N. W. 185; *Labs v. Labs,* 92 Neb. 378, 138 N. W. 561; *Kofka v. Rosicky,* 41 Neb. 328, 59 N. W. 788; *Damkroeger v. James,* 95 Neb. 784, 146 N. W. 936; *Lacey v. Zeigler,* 98 Neb. 380, 152 N. W. 792. Evidence that Hannah and her father entered into an oral agreement for services and compensation and proper inferences from the evidential facts outlined lead to the conclusion that any presumption of gratuitous labor by daughter to father was overthrown.

Another presumption is invoked to disprove a debt for

labor. The evidence shows that Hannah borrowed from her mother or father $1,500 in 1928, when a large part of the claim in issue was unpaid. In this situation the contestants state their position as follows:

"It is contrary to the experience and observation of mankind that one to whom another is indebted will borrow money from his debtor upon a promise to repay him, and at the same time make no mention of a debt claimed to be due from the debtor. A presumption arises from such a transaction that the lender is not indebted to the borrower in any sum."

The position thus taken is untenable for the reason that the presumption is overthrown by the evidence. The relation between a parent and an emancipated child does not prevent contractual obligations of one to the other. Hannah and her father were competent contracting parties. There was believable evidence of an agreement between them for labor and pay. A time for payment was not fixed. The amount of compensation was not mentioned. The period of service had not ended when the loan was made. While living in her father's home and working for him she had means for self-support. The evidence is that she did not borrow the money for her own benefit but devoted it to her daughter and son-in-law to aid them in procuring a home in Cozad, where they were engaged in the practice of dentistry. They paid the borrowed money back to her in instalments and she discharged her 1,500-dollar debt to her father—all ordinary business transactions. The better view of the entire record is that the presumptions upon which contestants rely are overthrown by the evidence.

The claim for compensation is not outlawed as pleaded by contestants. The agreement was a continuing one which did not expire until the death of the parents, when the statute of limitations began to run. *Phifer v. Estate of Phifer*, 112 Neb. 327, 199 N. W. 511.

The claim for an unpaid loan of $500 owing by testator to his daughter Hannah is not supported by the evidence. He received from her by check $500, but, for anything

appearing in the record, the transaction may have been payment of a debt owing by her to him.

For the error of the trial court in taking the case from the jury on the issue of compensation for services, the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

AMERICAN LOAN PLAN, APPELLEE, V. V. C. FRAZELL ET AL., APPELLANTS.
283 N. W. 836

FILED FEBRUARY 10, 1939. No. 30469.

1. **Replevin: AFFIDAVIT: WAIVER.** "Where an affidavit (in replevin) has defects in form or substance which might be amendable, if the parties in the case who might interpose objections to the affidavit appear, answer to the merits of the action, and go to trial without making objections to the affidavit, they waive the defects." *Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557, 71 N. W. 304.
2. **Novation.** "Where a creditor accepts from his debtor any form of new agreement in place of a prior contract or obligation between them, with the intent to cancel the former and to substitute the new one therefor, novation by the substitution of an obligation takes place." 46 C. J. 586.
3. **Usury.** "A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan." *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N. W. 429.
4. ———. "Where original purchase of automobile on credit was valid, it is immaterial in defense of usury to suit on note for car that finance company solicited contracts from automobile dealers and furnished schedules for that purpose." *Grand Island Finance Co. v. Fowler, supra.*
5. ———. "Purchase of note at discount beyond legal rate of interest does not constitute transaction 'usurious.'" *Grand Island Finance Co. v. Fowler, supra.*

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

W. A. Ehlers, for appellants.

Monsky, Grodinsky, Marer & Cohen, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action of replevin for a new Ford Tudor automobile, brought in the district court for Douglas county by the American Loan Plan, a corporation, against V. C. Frazell, John E. Frazell, and Marie Frazell. The record discloses that at the commencement of the action the plaintiff filed a petition, and also the statutory affidavit for a writ of replevin. It also appears that the writ of replevin issued, but the property claimed (the automobile in suit) was not taken thereunder, and the action proceeded as one for damages under the terms of the statute. Comp. St. 1929, sec. 20-10,106. A jury was duly impaneled, and, at the close of all evidence, the trial court sustained the motion of plaintiff, "to instruct the jury to return a verdict in its favor or that the jury be discharged and judgment entered for plaintiff," and entered judgment in favor of plaintiff and against said defendants, V. C. Frazell and John E. Frazell, and each of them, for the sum of $446.99 and costs of suit. From the order of the trial court overruling their separate motions for new trial, the defendants appeal.

The following facts appear in the record, substantially without dispute, viz.: In September, 1935, John E. Frazell approached the McFayden-Stewart Company to purchase an automobile. He sought a "time plan" purchase. There was a difference between the automobile price on a cash basis and when purchased on the "time plan." As the bargain was finally consummated, on the basis of the time plan, he purchased a new 1935 Ford, Tudor model; he received an allowance of $78.75 for an old automobile which he traded in, paid $50 in cash, and together with his father, V. C. Frazell, executed and delivered to the McFayden-Stewart Company a chattel mortgage note or contract in

triplicate, in the sum of $659, payable in 23 instalments of $27.50 and one of $26.50. At the time of the transaction it was expected by the parties that the Universal Credit Company would finance the transaction, and the chattel mortgage note or contract in triplicate was executed on blanks provided by that company. However, the Universal Credit Company refused to take the paper because of the time of maturity provided therein. Accordingly, the American Loan Plan, a corporation, plaintiff herein, was contacted, and it purchased the chattel mortgage note or contract (exhibits 5, 6, 7) and paid therefor by a check of $500, dated September 18, 1935, payable to the McFayden-Stewart Company, and received its purchase as indorsee or assignee thereof. Thereafter, within a few days, V. C. Frazell, John E. Frazell, and Marie Frazell (wife of John E. Frazell) executed a promissory note and a "conditional sale contract and assignment" securing the same (exhibits 1 and 2) covering the automobile purchased (and described in the chattel mortgage note or contract, exhibits 5, 6, 7, previously executed), which were delivered to the McFayden-Stewart Company, and then executed by the latter (together with necessary indorsements and assignments to the American Loan Plan), and in turn, by the McFayden-Stewart Company, delivered to the American Loan Plan, plaintiff herein. It appears that by agreement of the parties the instruments last executed (exhibits 1 and 2) were substituted for the instruments first executed (exhibits 5, 6, 7), which latter were, in due time, returned to and delivered back to Frazell, who accepted and received the same. Thereafter the Frazells made default in the payments contracted to be made, and thereupon this action was instituted to recover possession of the property covered by the conditional sale contract and assignment.

Appellants' first contention is that plaintiff cannot recover because in the affidavit in replevin it claims a right to recover by reason of a special ownership, and "the proof if any shows general ownership or title." The authorities cited by appellants in support of this contention are not in

point. True, it may be said the affidavit in replevin is defective. In this instrument the statement appears that plaintiff "has a special ownership in the above described property (the automobile in suit) under and by virtue of the terms and conditions of a certain instrument attached hereto marked exhibit 'A' and by special reference herein made a part of this affidavit," but "exhibit A" was not attached to the original affidavit in replevin and the terms and conditions of the instrument relied upon do not otherwise appear in this affidavit. No property was taken or secured by the writ of replevin which issued upon the filing of this affidavit. Neither was the sufficiency of this affidavit challenged by the defendants during or prior to the trial on the merits in the district court.

As applied to an action in replevin in the district court, a civil action is commenced by filing in the proper court a petition and causing a summons to be issued thereon. Its jurisdiction is dependent upon the petition filed and not upon what may appear in the affidavit in replevin. *Tiedtke v. Whalen,* 133 Neb. 301, 275 N. W. 79.

In the instant case the pleader had properly pleaded in its petition the conditional sale contract and assignment which furnished the basis of its cause of action. In fact, its sufficiency is not questioned. The case of *Hudelson v. First Nat. Bank of Tobias,* 51 Neb. 557, 71 N. W. 304, appears to control in the case here presented. In such *Hudelson* case no attack was made upon the affidavit in replevin preceding or during the trial. We quote from the opinion by the court, viz.: "It will no doubt have been noticed that there was an entire absence of any statement, either in the words of the Code or in their equivalents, or of facts which showed the wrongful, or any, detention of the property by the plaintiffs in error. This was a fatal defect. An allegation of unlawful detention is essential. Cobbey, Replevin, sec. 542. But this was an action in district court, and the petition, duly verified and on file, contained the statement of the wrongful detention of the property, and this was sufficient to give jurisdiction to issue the writ, and it was

not void but voidable; and had the writ and affidavit been attacked by proper plea, the court might on application have allowed the affidavit to be amended. *Commercial State Bank v. Ketcham*, 46 Neb. 568; *Lewis v. Connolly*, 29 Neb. 222. No objections were made to either the form or substance of the affidavit in the district court, nor was the validity of the writ of replevin questioned, so far as the record presented here discloses. By appearing and answering to the merits and going to trial without making such objections, the parties waived defects in the affidavit."

The appellants also contend that, "Where a purchaser of an automobile from a dealer receives a formal bill of sale complying with sections 60-310 and 60-325, Comp. St. 1929, transferring complete and absolute title to the purchaser, a subsequently executed conditional sale contract signed by the purchaser purporting to reserve the title of the automobile in the dealer is a nullity, the dealer having transferred his title by giving the bill of sale as required by law." In the instant case there are no third parties to this record. The controversy is between the appellants and the assignee of appellants' contract. The controlling rule is, viz.: "Where a creditor accepts from his debtor any form of new agreement in place of a prior contract or obligation between them, with the intent to cancel the former and to substitute the new one therefor, novation by the substitution of an obligation takes place." 46 C. J. 586.

Here, the conditional sale contract and assignment is supported by ample consideration. It is subscribed by both parties thereto. It creates by force of valid contract the rights therein specified, and is a valid, enforceable instrument. *Klingensmith v. Clow & Sons*, 270 Mich. 460, 259 N. W. 312.

The defense of usury, under the facts in this case, is clearly precluded by the doctrine announced by this court in *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N. W. 429. We are there committed to these views, viz.:

"A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting

the transaction with usury, though the difference in prices may exceed lawful interest for a loan.

" 'Where original purchase of automobile on credit was valid, it is immaterial in defense of usury to suit on note for car that finance company solicited contracts from automobile dealers and furnished schedules for that purpose.' *Commercial Credit Co. v. Tarwater*, 215 Ala. 123.

" 'Purchase of note at discount beyond legal rate of interest does not constitute transaction "usurious." ' *Commercial Credit Co. v. Tarwater*, 215 Ala. 123."

See, also, *Fidelity Finance Co. v. Westfall*, 127 Neb. 56, 254 N. W. 710.

So, too, the action in replevin was properly instituted against the defendants executing the so-called conditional sale contract and assignment. The property sought to be taken on the writ having been concealed and not recovered thereunder, the action properly proceeded as an action for damages against the same parties. The evidence in the record is clearly insufficient to prove the defense that the orginal transaction was a usurious loan instead of a sale.

It follows that the judgment entered by the trial court is correct, and it is

AFFIRMED.

FRED PICARD, SR., APPELLANT, V. FRANK STEINACHER, SHERIFF, APPELLEE.
283 N. W. 849

FILED FEBRUARY 10, 1939. No. 30411.

Intoxicating Liquors. When an officer seizes alcoholic liquors on a search warrant issued on a complaint authorized by the Nebraska liquor control act of 1935 (Comp. St. Supp. 1935, secs. 53-301 to 53-3,107), it becomes his duty to hold such liquors until all prosecutions arising out of such search and seizure, including injunction proceedings commenced under such act, shall have been ended and determined.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

J. J. McCarthy and *E. J. McCarthy,* for appellant.

John C. Gewacke and *Robert B. Waring, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This was a replevin action, brought to recover liquors taken by the defendant, the sheriff of Fillmore county, under a search warrant. Trial was had to a jury. After each party had rested, the defendant moved for a directed verdict in his favor. Motion was sustained, and jury directed to return a verdict finding that the right of possession at the time the replevin action was begun was in the defendant sheriff, and fixing the value of the property taken. Judgment entered on said verdict. Motion for a new trial overruled. Plaintiff appeals.

The transcript in this case sets out a copy of all the instruments filed, but fails to set out the time of filing of any of such instruments in the office of the clerk of the district court. The petition in replevin was verified October 29, 1937, and sets out that the property was taken by virtue of a search warrant issued by the county judge, but alleged that the complaint had been dismissed, and that there was nothing on file in any court whereunder the sheriff was holding said property, and alleged that the sheriff was holding said property wrongfully and unlawfully; that plaintiff had made demand therefor of the sheriff, who refused to return the same. Plaintiff prayed for judgment for the return of the property, or a judgment for its value in the sum of $550, and for his damages in the sum of $150.

The affidavit in replevin, attached to the petition, set out on four pages an itemized description of the property taken, which consisted of over 800 pint and half-pint bottles, some 47 quart bottles, and 35 "fifths" bottles of American and foreign brands of rum, gin, wine, whisky, and alcohol.

It appears that on September 12, 1937, the county attorney filed a complaint in the county court of Fillmore

county for a search warrant against the plaintiff under section 53-378, Comp. St. Supp. 1935, charging that he had just and reasonable grounds to believe that alcoholic liquor is unlawfully possessed, used, disposed of, and kept for sale in said drug-store, and on the same day the sheriff made return that he had seized certain intoxicating liquors which were concealed therein, and had the liquors in his possession, and was holding the same subject to the order of the court, and the return also stated that he had arrested Fred Picard, Sr.

On September 13, 1937, the county attorney of said county filed a second complaint against said Fred Picard, Sr., charging among other things that he was maintaining a common nuisance in having in his place of business alcoholic liquor for the purpose of sale, and on September 14 the sheriff made return, showing that he had arrested the said Fred Picard, Sr.

On October 26, 1937, the county attorney filed a motion that the complaint against Fred Picard, Sr., charging the offense of maintaining a common nuisance under the liquor laws of the state of Nebraska, be dismissed without prejudice, with the reservation that this motion shall in no wise affect the complaint theretofore filed against Fred Picard, Sr., for the search warrant, and that all proceedings thereunder should remain intact and unaffected by the motion to dismiss the complaint charging the offense of maintaining a common nuisance. It is further set out that the reason for the motion of dismissal is that a temporary injunction has now been obtained (on October 7, 1937), restraining, enjoining, and abating said nuisance, and that said action is pending in the district court for Fillmore county, Nebraska, and that it was not for the best interests of justice or public welfare that the said Fred Picard, Sr., be tried for maintaining a public nuisance prior to the determination of the injunction suit now pending in the district court against him. Thereupon, Howard W. Hamilton, county judge, dismissed the complaint charging the offense of maintaining a common nuisance, and it was further ordered

that such dismissal should in no manner affect the complaint for search warrant, or any of the proceedings had under said search warrant, but that all such proceedings should remain intact, unaffected, and unprejudiced by said order. Upon the hearing, an injunction was granted in the district court, and Fred Picard, Sr., appealed said injunction action to this court, and after argument this court on June 8, 1938, made that injunction permanent (no opinion) in case No. 30372, *State v. Picard.*

A portion of said permanent injunction reads as follows: "The court further finds that the defendant should be perpetually enjoined from refilling prescriptions of any type whatsoever calling for alcoholic liquor, whisky, or any type of intoxicants. That the defendant should be perpetually enjoined from selling, giving away, or otherwise disposing of alcoholic liquor or other intoxicants by any shift or device whatsoever."

It will thus be seen that, some three days after the criminal action for maintaining a nuisance had been dismissed in the county court, and while the injunction case was pending in the district court, this replevin action was brought in the case at bar.

Sections 53-379 and 53-380, Comp. St. Supp. 1935, provide that, upon the issuance of such search warrant, the officer shall seize, remove therefrom, and confiscate all alcoholic liquors stored, kept, and sold, and the containers thereof, and shall make an accurate list and inventory of the articles, and "hold such property until *all prosecution* arising out of said search and seizure shall have ended and determined."

It is the contention of the plaintiff herein that, when the complaint for maintaining a nuisance was dismissed, such dismissal carried with it the dismissal of the search warrant complaint, and that all of the criminal proceedings were then terminated against said Fred Picard, Sr., and that the injunction case which was then pending was not a criminal prosecution, but only a civil action, and that said Fred Picard, Sr., was entitled to the return of all his

liquors; that as a druggist he had a right to have all of said liquors, for he made use of liquor in filling prescriptions, and that the injunction proceedings could not in any way dispose of the intoxicating liquor held upon search warrant; that Fred Picard, Sr., had an absolute property right to all of said liquor, and could not be deprived thereof, and that this replevin action was brought because said Fred Picard, Sr., had a property right therein which could only be reached by the replevin proceedings, in which he should have prevailed, for, there being no prosecution pending against him, the sheriff should have surrendered the liquors to him upon demand.

We are cited to the case of *Malli v. Willett,* 57 Ia. 705, 11 N. W. 661, in which the consideration for a contract for a life lease of real estate to Christina Malli was to settle a threatened prosecution for adultery. It is said by the court that a contract made in consideration of forbearance to prosecute would be void, yet it would not reverse a cause without clearer evidence that it was the criminal charge which was compromised than had been given, for the brother could have been prosecuted criminally for the offense, or a civil action for damages might have been brought, and the court says: "In common parlance the word prosecution is frequently applied to civil actions for torts."

In *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N. E. 177, in a contract between owners of marble quarries recitals as to controversies and prosecutions were held not void on its face as undertaking to strangle threatened criminal prosecutions, for the word "prosecution" is frequently used respecting civil litigation.

But, on the other hand, may not an injunction suit be, in effect, a criminal prosecution?

"In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." Story, Equity (3d ed.) sec. 923.

This court, in the case of *State v. Ak-Sar-Ben Exposi-*

tion Co., 121 Neb. 248, 236 N. W. 736, said: "A wrong arising out of repeated violations of a penal statute and harmfully affecting the rights and interests of people generally throughout the state, when committed by a corporation engaged in the public service, is a public wrong which may be enjoined by the supreme court in an original suit in equity wherein the state is plaintiff."

For a full discussion of this question, see 10 Neb. Law Bulletin, 190, in which many citations may be found.

The jurisdiction and powers of courts of equity come directly from the Constitution, and consequently are not limited by subsequent legislation. *Matteson v. Creighton University*, 105 Neb. 219, 179 N. W. 1009.

To conclude our discussion, section 53-380, Comp. St. Supp. 1935, provides that the officer who seizes alcoholic liquor under a search warrant shall "hold such property until all prosecution arising out of said search and seizure shall have ended and determined."

In whatever light we view this injunction proceeding, whether it is a civil action or a criminal procedure, it is in any event clearly a "prosecution," based upon the alcoholic liquor seized, and, therefore, when this injunction proceeding was begun, the sheriff under the law was required to retain possession and custody of such liquors, and an action in replevin to take said property from the sheriff will not lie. For which reasons, the judgment of the district court is hereby

AFFIRMED.

JOHN C. THOMAS, APPELLEE, V. GEORGE FUNDUM ET AL., APPELLANTS.
283 N. W. 839

FILED FEBRUARY 10, 1939. NO. 30472.

1. **New Trial.** When codefendants join in a motion for a new trial, errors assigned which are not good as to all the defendants are not good as to any.
2. **Appeal.** In a law action the findings of a jury on conflicting

evidence will not be disturbed unless clearly wrong.

3. Evidence examined and *held* that plaintiff was not guilty of such contributory negligence as would bar a recovery as a matter of law.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Chambers, Holland & Locke, for appellants.

Burkett, Wilson & Van Kirk, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an action to recover damages for personal injuries sustained by plaintiff while he was employed in harvesting wheat. The farm upon which the injuries were sustained was owned by Simon C. Mook until his death, which occurred three days prior to the accident. A verdict was returned against Merle Mook, administrator of the estate of Simon C. Mook, deceased, and George Fundum, another employee whose negligence is alleged to have caused the accident. A joint motion for a new trial was filed by the defendants. An appeal was taken from the overruling of this motion.

Plaintiff asks this court to invoke the rule that, when codefendants join in a motion for a new trial, errors assigned which are not good as to all defendants are not good as to any. This has long been the rule in this state.

In *Lydick v. Gill,* 68 Neb. 273, 94 N. W. 109, this court said: "Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants." See, also, *Long v. Clapp,* 15 Neb. 417, 19 N. W. 467; *Gordon v. Little,* 41 Neb. 250, 59 N. W. 783; *Davey v. Aevermann,* 110 Neb. 62, 192 N. W. 956; *Koehler v. Farmers State Bank,* 112 Neb. 590, 200 N. W. 52.

After the application of this rule, the only question remaining is whether the court erred in overruling defendants' motions for a directed verdict. These motions were based on the contention that plaintiff's contributory negligence was such as to defeat a recovery as a matter of law.

The evidence in this case discloses that plaintiff and defendant Fundum were both employed on the Mook farm and were engaged in combining wheat at the time of the accident. It was necessary, whenever the bin on the combine became full, to stop the machine and back a truck up to it in order that the wheat could be transferred from the bin to the truck. It was then necessary to drive the truck away from the combine before it could continue with the cutting and threshing of the wheat. At the time the accident happened, the wheat in the bin on the combine had just been transferred to the truck. The defendant Fundum got in the truck to drive it away, and, instead of moving forward, it backed up and caught the plaintiff between the truck and the combine, inflicting the injuries of which plaintiff complains.

The plaintiff testified that, as Fundum got in the truck to drive it away, plaintiff walked in between the rear of the truck and the combine to remove the spout which conveyed the grain to the truck. While he was between the two machines, the truck suddenly backed up and jammed the plaintiff against the combine, causing the injuries for which this action was brought.

The testimony of the defendant Fundum was that the truck had been left in reverse, and as he turned on the switch the motor started without his stepping on the starter, causing the truck to back up unexpectedly. He further states that plaintiff was standing several feet from the truck at the time he got in to drive it away, and that he did not know or anticipate that plaintiff would walk in between it and the combine.

Plaintiff testified that Fundum directed him to go between the truck and the combine to remove the grain spout. This is denied by Fundum. The evidence of Fundum that

the truck motor started when the switch was turned on, without his stepping on the starter, is contradicted by the evidence of an expert mechanic who stated that it was impossible for the particular model of truck involved to start merely by turning the switch. It is not disputed that the ground upon which the truck stood was practically level and that there was no apparent slope.

We are convinced that the question of the negligence of the defendant and the contributory negligence of the plaintiff was for the jury, and that plaintiff was not guilty of such contributory negligence as would, as a matter of law, defeat a recovery.

There is no evidence in the record that the truck had ever backed up before on any of the numerous occasions that it had been driven away from the combine. There was no evidence of any fact or circumstance that would indicate to plaintiff that it was dangerous to walk between the truck and the combine. There was no warning of danger, unless the jury believed the testimony of Fundum as against the conflicting statements of plaintiff. There was nothing in the slope of the ground or other physical facts to warn plaintiff of danger. We conclude that the question of the negligence of defendant Fundum and the contributory negligence of plaintiff was one of fact to be determined by the jury. There was conflicting evidence which the jury necessarily considered in arriving at a verdict. We are not in a position to say that the verdict was clearly wrong and we will not, therefore, disturb it. *Anderson v. Lotman,* 124 Neb. 795, 248 N. W. 309, and cases therein cited. The trial court was right in overruling the motions for a directed verdict.

The trial court having correctly ruled on the only issue properly raised by the joint motion for a new trial, the judgment ought to be and is

AFFIRMED.

LILLIAN F. HOLFERTY, APPELLEE, V. SARAH M. WORTMAN ET AL., APPELLEES: BRUCE SHURTLEFF, APPELLANT.
283 N. W. 855

FILED FEBRUARY 10, 1939. NO. 30458.

1. **Execution.** Where a sale of real estate is conducted substantially in the manner prescribed by the notice and in accordance with the decree, it is sufficient, and confirmation thereof may be had.
2. ———. Proceedings of the sheriff who made the sale and all proceedings in connection therewith examined, and found to be in conformity to law, and the bid accepted *held* to be an unconditional bid, in conformity to the notice and decree of the court, and so treated by the party making the bid and by the court.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

C. Russell Mattson, for appellant.

C. S. Wortman, Leyda & Leyda and *Chambers, Holland & Locke, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an appeal from an order of the district court for Cass county, overruling a motion by the appellant, Bruce Shurtleff, to require the sheriff to amend return on order of sale and declare him sole and only lawful bidder at the sale.

Plaintiff, Lilliam F. Holferty, on August 30, 1937, filed a petition, proper in form, to foreclose a tax lien. The only answering defendant was Sarah M. Wortman, who filed an answer alleging that she was the owner and holder of a judgment in the sum of $5,500, rendered October 1, 1936, in the district court for Cass county, in a foreclosure proceeding against Harvey Rathbone and Hazel V. Rathbone, defendants, asking for an accounting and that her judgment for $5,500 and interest be declared superior to all claims of other defendants; that said premises be sold and

she have a deficiency judgment for such sum as shall be due her against defendants Harvey and Hazel V. Rathbone. November 8, 1937, the district court entered a decree in foreclosure, finding that the plaintiff was entitled to the sum of $369.80, with interest, costs and attorney fees, and that defendant Sarah M. Wortman had a junior lien to that of plaintiff in the sum of $5,864.83, granting defendants Rathbone and defendants Hays, who defaulted, 30 days from the entry of decree to pay the plaintiff and the cross-petitioner-defendant the amount of the liens, and, upon failure so to do, said defendants' equity of redemption would be foreclosed. The court found the record title to be in defendant Ralph K. Hays. Defendant Harvey Rathbone claimed title by an unrecorded deed which he received in 1931, and since that time he has had control of the land and rented it to others, receiving the benefits therefrom and paying no taxes thereon. Allen Gillespie, the tenant, was served with summons, and there is a claim made that Glen Keetle was a codefendant with Gillespie and not served with summons, and as to the latter's alleged interest the record is very vague. There are no improvements on the real estate. The oral testimony raises a controversy as to the bid of Sarah M. Wortman; that is, whether it was conditioned upon confirmation and possession.

The affidavit of publication on January 17, 1938, shows that, pursuant to the order of the clerk of the district court, the property would be sold on January 22, 1938, to the highest bidder for cash. The property involved is an 80-acre tract designated as the east half of the northeast quarter of section 17, township 12 north, range 9, east of the 6th P. M., in Cass county. The return of the order of sale shows the premises sold to Sarah M. Wortman, defendant, in the amount of $6,000, using the language "upon confirmation of sale and possession." On January 25, 1938, objections to confirmation were filed by defendants Rathbone, setting forth that the 6,000-dollar bid of Sarah M. Wortman was made, conditioned upon confirmation and possession, and was, therefore, not a lawful bid. On Janu-

ary 29, 1938, the appellant filed a motion to require the sheriff to amend his return by making said return read "that the property was sold to Bruce Shurtleff, * * * for the sum of $3,000, he being the highest and best bidder for cash, for the reason that" he was "the only bidder for cash at said sale, and the only person making an unconditional bid, and that sale was closed after said $3,000 bid had been made and after a purported bid was made by another, said bid being in conditional form and conditioned upon possession of the property." This motion was supported by affidavit. On March 8, 1938, the objections of Harvey and Hazel V. Rathbone to confirmation of sale were overruled, and no appeal taken therefrom. The motion of appellant was overruled.

The court, in its decree of confirmation, confirmed the sale in Sarah M. Wortman, directed the sheriff to place the purchaser in possession of the premises so sold, and stated further: "After having carefully examined the proceedings of the sheriff who made said sale, and being satisfied that said sale has in all respects been made in conformity to law and that the sum of $6,000 bid for said premises by the said defendant, Sarah M. Wortman, was properly accepted and reported and was the fair value of said premises so sold under the circumstances and conditions of said sale."

Appellant assigns as error that the findings and judgment of the court are contrary to the law and the evidence.

The case of *Farmers Security Bank v. Wood*, 132 Neb. 175, 271 N. W. 349, is cited. In that case this court held: "The court should refuse to confirm a sale of lands under execution where it is evident from the notice, return of the sheriff and the decree, upon proper objections filed by parties in interest entitled to raise the question, that the sale was not conducted substantially in the manner prescribed by the notice and in accordance with the decree." The test is whether or not the sale was conducted substantially in the manner prescribed by the notice and in ac-

cordance with the decree. In the opinion it was said (p. 178): "The only way the officer (in the instant case, the sheriff) having the order of sale can be heard to speak is through his return which must affirmatively show that he complied with the law. *Gundry v. Brown*, 1 Neb. (Unof.) 877, 96 N. W. 610."

With this in mind, we turn to the return to order of sale in the instant case which in part reads: "To Sarah M. Wortman, defendant upon confirmation of sale and possession." The word "condition" does not appear in the order. Obviously, the words, "upon confirmation of sale," are not subject to exception, for, unless the sale is confirmed, no bidder would be obligated. The decree confirming the sale directed the sheriff to place the purchaser in possession of the premises so sold. Without question, decrees of confirmation may so state. The competent evidence, the proceedings relating to the sale, the return thereon, the decree of confirmation, all disclose that the parties treated the bid of Sarah M. Wortman as a *bona fide* bid, in conformity to the notice and decree of the court; that the sale was conducted substantially as prescribed by the notice and in accordance with the decree.

We believe, on the merits of this case, and without discussing the right of appeal from overruling of appellant's motion, which is not contested, that the trial court properly overruled appellant's motion and confirmed the sale.

AFFIRMED.

BEULAH LOWE, ADMINISTRATRIX, APPELLEE, V. CHICAGO LUMBER COMPANY OF OMAHA, APPELLANT.

283 N. W. 841

FILED FEBRUARY 10, 1939. No. 30595.

1. **Workmen's Compensation:** INDEPENDENT CONTRACTOR. "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case." *Showers v. Lund*, 123 Neb. 56, 242 N. W. 258.

2. ———: ———. "An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562.
3. ———: ———. "An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his emp'oyer, except as to the results of the work." *Petrow & Giannou v. Shewan*, 108 Neb. 466, 187 N. W. 940.
4. ———: ———. A person who contracts to supply all the labor to build, and agrees to supervise the construction of, a barn according to a plan furnished, and to do anything necessary in line with regular construction, not mentioned in the contract, to insure a complete job, and receives a definite amount for the work done, furnishes his own tools, employs, controls and discharges the workmen and fixes their hours and wages, *held* to be an independent contractor and not an employee.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed and dismissed.*

Frederick M. Deutsch, for appellant.

Wagner, Wagner & Albert and *Carroll Thompson, contra.*

Heard before SIMMONS, C. J., ROSE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The administratrix of the estate of Charles E. Lowe brought an action to recover compensation, arising out of the death of Charles E. Lowe. The compensation court denied the claim, and on appeal to the district court for Platte county, an award was granted, from which the defendant appeals.

Plaintiff's petition is usual in form. The answer is a general denial and a specific denial that the deceased was in defendant's employ at the time of receiving the injury resulting in his death. The reply to the answer pleaded estoppel, and reference will be made thereto in the opinion.

The record discloses a contract made by the Penn Mutual Life Insurance Company with the defendant Chicago Lum-

ber Company of Omaha, a corporation, wherein the latter agreed to build a barn on the Hill farm in Platte county, Nebraska, which was owned by said insurance company, for the sum of $1,325, furnish all necessary material and carry compensation insurance "to cover all workmen engaged on such work." On or about June 2, 1937, the defendant entered into a contract with Charles E. Lowe, wherein the said Lowe agreed to supply all the labor to build, and agreed to supervise construction of, a barn on the Hill farm in Platte county, according to a plan furnished by defendant. The size of the barn and the general specifications are covered at some length in the contract, and following the general specifications appears this language: "The intention of this contract is that the barn shall be built by party of the first part, substantially and according to plan as near as feasible to make a satisfactory and good job. Anything necessary in line with regular construction not mentioned herein shall be accomplished by the party of the first part to insure a complete job." The contract also provided that Charles E. Lowe was to receive the sum of $325 and contained the following language: "Party of the second part (defendant) further agrees to carry full workmen's compensation Insurance and Public Liability Insurance, without cost to C. E. Lowe." The contract further provided that the work was to be completed in 60 days from May 24, 1937; the old barn on the farm was to be torn down, and all sound lumber therefrom was to be used in the construction of the new barn.

Before the contract was signed, the manager of the defendant and Mr. Lowe inspected the premises and the old barn thereon, and the manager designated the lumber from the old barn that would be used in the construction of the new barn. The work of razing the old barn was commenced June 5, 1937. Several changes were made in the construction of the barn to suit the tenant, and at times, when Mr. Lowe and his son would call at the lumber office of the defendant at St. Edward, Nebraska, the manager of the defendant and Mr. Lowe would talk over the changes

required by the tenant. The barn was to be built to suit the convenience of the tenant. During the course of construction of the barn many changes were suggested by the tenant and some by defendant's manager, which were talked over at the lumber office by Lowe and the manager; such changes were made. Most of them provided for the placing of doors at different points, enlarging the mangers, providing for a cement floor in front of the cattle stalls, and making a grain bin instead of a horse stall at one point, and other changes. While the changes were numerous, in most instances no greater amount of material or labor was necessary to complete them; no extra charge was made by Mr. Lowe, and nothing was said as to an additional charge with the exception of a charge for a cupola, placed on the barn, for which Mr. Lowe received $5. The record does not disclose exactly when or how the changes were agreed upon. The manager of defendant left about June 15, 1937, on a vacation and returned a few days after Mr. Lowe's death. No representative of the defendant was on the premises after the signing of the contract. On July 7, 1937, Mr. Lowe was working on a hay fork hood, putting on siding, when the scaffolding on which he stood gave way, severely injuring him, and from such injuries he died July 17, 1937. After his death his son, who was then working on the job, went ahead and completed it.

While the manager of defendant was on his vacation and after Mr. Lowe fell, one Wright was at the yard and apparently in charge. Wright went on the premises at one time and told the deceased's son how the hay door should be constructed, and the manner in which it would be most solid and hang the best. The son followed his directions. No other direction was given by Wright. Defendant's manager went on the premises once after Mr. Lowe's death, while the son was completing the job, and at that time talked about the changes in the mangers and the hardware needed to complete the barn, and some conversation was had about a cement floor in the horse barn which was not placed therein.

The plaintiff offered in evidence exhibit 2, a statement to the Penn Mutual Life Insurance Company for the construction of the barn, dated August 9, 1937, in an account with the defendant. This statement showed a total amount of $1,391.08 and contained the following: Workmen's compensation insurance on $330, $20.26; public liability insurance on $330, 82 cents. There was also offered in evidence exhibit 4, purporting to be copy of a letter written by the defendant to New Amsterdam Casualty Company under date of June 10, 1937, informing the company that defendant had taken a building contract for labor and material on a farm building on the Hill farm, the letter containing the following paragraph: "A complete record of the labor on this job will be sent in to our Omaha office and will be on file here for your auditor when he audits our payroll."

After the barn was completed and all expenses paid by the administratrix, there remained, including $5 for saving of lumber and $5 for the cupola, the net sum of $110. When Mr. Lowe was living he employed, besides himself and son, three men. At the time of his fatal injury, the deceased had worked 20 days. The evidence also establishes that Mr. Lowe was the sole and only support of his wife and two sons, 16 and 19 years of age, respectively. On the foregoing evidence the district court made an award.

The defendant contends that the decision of the trial court is contrary to and not sustained by the evidence and the law; that deceased was not an employee within the contemplation of the workmen's compensation act of this state but was an independent contractor, citing *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48, wherein this court held: " 'An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.' *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562;" and one "who has the right to employ his own assistants; who has the right to determine the

hours of labor; and who has the power to direct how and when the detail of the work shall be performed is an independent contractor within the meaning of the workmen's compensation law." In the opinion in the *Prescher* case we find this language (p. 650):

"Whether the deceased was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case. *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258. An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work. * * *

"The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price."

The case of *Petrow & Giannou v. Shewan,* 108 Neb. 466, 187 N. W. 940, in substance held that the distinction between an independent contractor and an employee is that an independent contractor contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer except as to the results of the work. It was further held: "The act of the employer in giving such directions as may be found necessary to secure compliance with the contract, according to the plan adopted by him and agreed upon between the parties, is not necessarily inconsistent with the existence of the status of his workman as an independent contractor." It was said that the issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from the facts in each case.

In *Potter v. Scotts Bluff County,* 112 Neb. 318, 199 N. W. 507, the opinion at page 321 cites *Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850, 174 N. W. 866, wherein it was held: "The right to supervise, control, and direct the work is one of the tests for determining whether a person

is an independent contractor or an employee, but it is not the sole and only test. * * * A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job."

In the instant case, as provided by the contract, Charles E. Lowe agreed to supply all labor with which to build the barn and agreed to supervise ("to oversee for direction; to superintend; to inspect with authority." Webster's New International Dictionary) construction of the barn. There was a designated time in the contract for the barn to be completed, viz., 60 days from May 24, 1937. He employed all of the workmen, fixed their hours of work and the amount of their wages. He had control over the construction of the barn, and by the contract he agreed that the barn would be built "substantially and according to plan, as near as feasible ("capable of being done, executed, or effected." Webster's New International Dictionary), to make a satisfactory and good job;" also to do "anything necessary, in line with regular construction not mentioned" in the contract, "to insure a complete job." It was generally understood by the manager of defendant and Mr. Lowe that the barn was to be constructed for the convenience of the farm and the tenant thereon, and changes, such as were made, were within the contemplation of the parties. Mr. Lowe was satisfied with the general changes and did not make an additional charge therefor. He contracted to do a specified piece of work for a specific price, namely, $325. The manager of the defendant did not interfere with the progress of the work, did not control or supervise it, and during most of the period when Mr. Lowe was constructing the barn the manager was on a vacation and was not on the premises until after the son had taken over the work. Mr. Wright did not control or supervise the work, and the instructions given by the manager of defendant or Wright were such as were necessary to insure compliance with the contract according to the plans and specifications

thereof, adopted by the parties, and not inconsistent with the existence of the status of Mr. Lowe as an independent contractor. He was working for a profit; it was up to him to determine the amount of that profit by his saving on labor, time, etc. No definite wage was fixed for him. He knew the amount he was to receive upon the completion of the barn. The construction of this barn was his own independent business.

Plaintiff, by reply to the answer, alleged that the defendant verbally stated to Charles E. Lowe that it would carry compensation to protect him and all persons assisting in the construction of the barn; that Charles E. Lowe entered into the contract in reliance upon said statement, and that by reason thereof the defendant is estopped to deny that Lowe was working on construction of the barn other than as an employee of the defendant herein. The contract is not ambiguous, and if Mr. Lowe, himself, as an independent contractor, was carrying compensation insurance, he would be carrying it for the benefit of his employees, and no personal recovery for injuries received by him would have been had by him thereunder. As part of the consideration for the contract, the defendant agreed to carry compensation insurance to cover workmen in the construction of the barn and relieve Mr. Lowe of such responsibility. There is no evidence in the record that any statement was made to him to lead him to believe that he was, or would be, covered by such insurance carried by this defendant.

Speas v. Boone County, 119 Neb. 58, 227 N. W. 87, is cited, to the effect that the workmen's compensation act should be liberally construed, so as to obtain the accomplishment of its beneficent purpose. The court cannot create a liability where the law creates none. See 2 Schneider, Workmen's Compensation (2d ed.) p. 2130.

Appellee cites and relies on the case of *Habrich v. Bent*, 200 Wis. 248, 227 N. W. 877, stating that there is a great similarity between such case and the case at bar. In the *Habrich* case there was no written contract, and defendant

Bent was to complete the work started by Habrich on three branch roads. Bent was an expert in building roads; he had the heavy machinery necessary, and the current wages paid in the locality were agreed upon between the parties. Habrich had confidence in Bent, but retained the right to exercise control over the work, and at times did give orders to the men regarding the work. Bent was not on the premises to complete any certain piece of work. He was subject to discharge by Habrich. He was not there to work for any given length of time, and had no control over the details of the work, which it was within the power of Habrich to veto. The court said that there was nothing in the testimony that deprived Habrich of that power, and the question was not whether he exercised that power, but whether he had the right to exercise it. The facts in the instant case disclose the difference between the two cases.

We believe that the evidence in the case at bar is of such a nature that estoppel, as relied upon by appellee, cannot be sustained.

In analyzing the facts in the instant case, we can arrive at no other conclusion than that Mr. Lowe was an independent contractor and not an employee; that the relation of master and servant did not exist as between the parties, and the award made by the district court and judgment thereon should be and are reversed, and the cause dismissed.

REVERSED AND DISMISSED.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT, V. HENRY J. NUERNBERGER ET AL.: F. H. ROOST, ADMINISTRATOR, ET AL., APPELLEES.

284 N. W. 266

FILED FEBRUARY 17, 1939. No. 30442.

1. **Mortgages:** PRIORITIES. "Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not

an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage." 41 C. J. 582.

2. **Equity.** "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal *status*, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 849.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Sidney T. Frum and *Quintard Joyner*, for appellant.

W. V. Steuteville and *S. W. McKinley, Jr., contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

The problems presented in this case arise from the following facts:

In 1923 Henry J. Nuernberger and Louis Roost were the owners, as tenants in common, of a quarter-section of land in Dakota county, and at that time mortgaged the land to the plaintiff to secure an indebtedness evidenced by a promissory note of $8,000 running for a period of five years, with interest at 5 per cent. per annum.

Louis Roost died in 1926, leaving a last will and testament that was duly admitted to probate. The material provisions of that will are as follows:

"Item 1. It is my will that all my just debts and expenses of my last sickness, death and burial be first paid out of my estate.

"Item 2. I hereby give, devise and bequeath unto my wife, Annie Roost, if she survive me, all my household furniture and all the personal effects contained in my home, not including however, any money or evidences of debt that may be in my home at the time of my death.

"Item 3. I hereby give, devise and bequeath unto my said wife, Annie Roost, if she survive me, the home which I now occupy, and the lots on which the same is situated to wit: Lots 9, 10, and 11, in Block 20 Moan's Addition to South Sioux City, Nebraska.

"Item 4. I hereby give, devise and bequeath to my said wife, Annie Roost, the use, rents and income for the term of her natural life of all the property which I shall hereinafter bequeath in items 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, meaning hereby that none of the property which I hereinafter bequeath to the devisees named in items 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, shall pass to such devisees, respectively until the death of my said wife, and it is further my will in case the other property which I devise to my said wife, together with the use, rents and income from the property mentioned in the aforesaid items, shall at any time prove insufficient to properly support and care for my said wife, that she shall have the right to draw upon and use the principal of the bequests named in said items to such extent as may be necessary for her proper care and support."

In item 5 he devises certain real estate (not that involved in this action) to a nephew "subject however, to the use, rents and incomes thereof and other possible reservations mentioned and preserved to my wife in item 4 above."

"Item 6. I hereby give, devise and bequeath unto my nephew, Louis Roost, son of Frederick Roost, of Klein-Wootz, by Lenzen on the Elbe Province of Brandenburg, Germany, the sum of Three Thousand ($3,000) Dollars, subject, however, to the use and income thereof and other possible reservations mentioned and reserved to my wife in item 4 above."

Items 7 to 14, inclusive, in language similar to that of item 6, contain bequests totaling $11,000 to other named

beneficiaries, subject to the same condition as set out in items 5 and 6.

"Item 15. All the rest, residue and remainder of my property of every kind and nature not hereinbefore devised or bequeathed, I hereby give, devise and bequeath unto my said wife, Annie Roost."

In the probate proceedings, the executors of his estate reported on June 18, 1927, that they had no cash on hand; that they had a certain real estate mortgage for $10,500 and a certain contract for the sale of real estate, upon which there was a balance owing of $11,000; that there was no other personal property; that there were "certain cash bequests amounting to approximately $14,000, which are to take effect only after the death of the surviving widow, Anna Roost. That said Anna Roost is to have the use, rents and income from all of said bequests, including all the land of the deceased, during her lifetime. * * * That under the terms of the will the said Anna Roost is the residuary legatee after the payment of the cash bequests." The executors prayed that they be authorized to assign and deliver the said contract and mortgage to Anna Roost "under such terms and conditions as the court may fix;" and stated that it was their opinion that the said contract and mortgage should be assigned to her "as trustee under the will of Louis Roost, deceased, so that she can continue to draw the rents out and income therefrom, during her lifetime, and that the same may be preserved or such part of it as may be necessary for distribution to the several devisees named in the will." The contract and $10,500 mortgage were assigned, under orders of the court, to Anna Roost, "as trustee." In January, 1928, the executors were discharged.

In 1928 Nuernberger and Anna Roost made application for an extension of the 1923 mortgage, reciting in the application that they were the owners of the land.

At that time plaintiff had the abstract of title extended, and the probate proceedings in the Louis Roost estate were shown. Plaintiff's attorney then examined the abstract and

found "that at the time of the execution of said extension agreement the title to said premises was good in *fee simple* in Henry J. Nuernberger and Anna E. Nuernberger, his wife, and Anna Roost, widow."

In 1933 Nuernberger and Anna Roost again applied for renewal of this mortgage, reciting ownership of the land, and executed a new note to the plaintiff for $8,000, payable $200 each year beginning March 1, 1934, and $7,200 payable March 1, 1938, with interest at 5½ per cent., secured by a mortgage on said premises which was executed on June 15, 1933, and recorded at that time. The abstract of title was then brought down to date and examined by plaintiff's attorney, who said in his opinion "A good, marketable and indefeasible title in *fee simple* was vested in Henry J. Nuernberger and Anna Roost at the time said mortgage was executed and recorded," and that the mortgage dated March 1, 1933, "is a valid lien and the first encumbrance of record against said premises," subject to the mortgage of January 31, 1923, and "that there are no liens which have been subordinated" to the mortgage of January 31, 1923.

Following that, the 1923 mortgage was released of record by the plaintiff, and the evidence of indebtedness secured thereby was marked paid and was delivered to Nuernberger.

Anna Roost died in 1935. Her estate was duly probated, and notice to creditors given. The plaintiff did not file a claim in the Anna Roost estate. Following her death, F. H. Roost was appointed administrator *de bonis non* with the will annexed of the estate of Louis Roost, deceased.

As such administrator, he reported receipt of $5,000 Federal Land Bank bonds, which he had sold for $5,138; that from these funds, under orders of the court, he made payments to the specific beneficiaries, leaving a balance due them of $9,100; that he received no other personal property; that he received possession of one-hundred twenty-five acres of farm land near Ponca, and a half interest in a farm north of Emerson, that half interest being the

land involved in this controversy. It appears that the $5,000 of bonds was the remainder of a settlement of $7,500 which Mrs. Roost had made on the $10,500 mortgage, which had been assigned and delivered to her; and that the land near Ponca was the land that had been sold by Louis Roost under the contract hereinbefore referred to, which had been surrendered to her, encumbered with delinquent taxes, because of the default of the purchaser.

In December, 1936, plaintiff filed its petition in this action, asking for foreclosure of its 1933 mortgage, and subsequently filed an amended petition bringing in other parties, and joining the land as a party. Thereupon, F. H. Roost, as administrator of the estate of Louis Roost, filed an answer, alleging the ownership of Louis Roost in this property at the time of his death, his will, the special bequests, that the wife had a life estate in said premises and a residuary estate subject to the charge of said bequests, that 30 per cent. of the special bequests had been paid; that the unpaid bequests were liens prior to the plaintiff's mortgage, and prayed for either a dismissal of the action, or that, if the real estate were sold, one-half of the proceeds should be paid to the administrator to apply so far as necessary to the payment of the special bequests.

Thereupon the plaintiff filed its second amended petition, making the beneficiaries of the wills of Louis Roost and Anna Roost parties; set up its 1923 note and mortgage; alleged the death and the will of Louis Roost, execution of the 1933 note and mortgage; that the Nuernbergers and Anna Roost were the owners of the property; that it relied upon the statements in the applications; that it believed that the special legacies had been paid; that it believed that the mortgagors had a good title; that property was assigned to Anna Roost sufficient to pay these special bequests; alleged laches and estoppel on the part of the defendants; prayed for a foreclosure of its 1933 mortgage, or, in the alternative, if that was found not to give a valid lien upon the entire property, that the release and cancelation of the 1923 mortgage be set aside, and that mortgage

be reinstated; that it be subrogated to its former rights under the 1923 mortgage, and that the 1923 mortgage be foreclosed. Plaintiff prayed for equitable relief.

Those who were given the special bequests under the Louis Roost will answered; set up their rights; alleged that they had not been fully paid; that the plaintiff received a new consideration for its 1933 mortgage in the personal liability of Anna Roost, the increase in the interest rate, the payment of interest and taxes; and pleaded laches.

The trial court found that Anna Roost owned a life estate in this land and a contingent interest therein as residuary legatee after the payment of the specific bequests; that the estate was not sufficient to pay all of the bequests; that plaintiff made no effort to collect its indebtedness from the Anna Roost estate; that plaintiff received a consideration for the new mortgage not included in the original note and mortgage, to wit: The personal liability of Anna Roost, an increase in the interest rate, and collections of interest under the new note and mortgage; that plaintiff released its 1923 mortgage with full knowledge of all facts, and with full knowledge that the bequests had not been paid; that plaintiff's mistake was one of law and not of fact; that there remained unpaid $9,100 in specific bequests; that there were not sufficient assets without this land to pay the special bequests. The court denied the reinstatement and foreclosure of the 1923 mortgage; found that plaintiff had a first lien upon the undivided half interest belonging to Nuernberger, and a lien upon the one-half Roost interest, subject to the payment of legacies due under the Louis Roost will; rendered a decree against Nuernberger for the full amount due; and ordered a sale of his undivided one-half interest.

From that decree, the plaintiff appeals. In this appeal Nuernberger is not a party, and his interest in the land is not involved.

Did Anna Roost have the power to convey by mortgage the undivided one-half interest in this property free from, or superior to, the claims of the defendants for the pay-

ment of their special bequests? The answer to that question depends upon a construction of the will of Louis Roost.

"The court in construing a will must first ascertain the intent and purpose of testator as disclosed by the language of the will and then give effect thereto if not contrary to law. Section 76-109, Comp. St. 1929, requires such construction." *In re Estate of Hunter*, 132 Neb. 454, 272 N. W. 318. See *In re Estate of Mooney*, 131 Neb. 52, 267 N. W. 196.

"Where the intent of the testator is clear from the terms of his will, courts will unhesitatingly give full force and effect to such intent." *Seybert v. Seybert*, 118 Neb. 246, 224 N. W. 1.

"In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104.

Applying these principles to the Louis Roost will, we reach the following conclusions: Louis Roost in his will made certain specific devises and bequests: First, certain personal property to his wife; second, the home place to the wife; third, a piece of land and specific cash bequests to named parties, subject to a life estate and certain granted powers to the wife; fourth, the residue to the wife.

His wife, Anna Roost, is given a *life estate* in the property described in items 4 to 14, inclusive, together with the powers therein set out. She is given an estate *in fee* in "all the rest, residue and remainder of my property of every kind and nature not hereinbefore devised or bequeathed." See Comp. St. 1929, sec. 30-202.

The undivided one-half interest in the land involved in this action was not "hereinbefore devised or bequeathed." It follows that it is not included in the devise of the life estate, or affected by the powers granted to the widow in item 4 of the will.

Certain cash legacies totaling $14,000 are provided in items 6 to 14.

"When pecuniary legacies are given in the will and there is a gift of the residue, both real and personal, the residue

being blended in one mass, the presumption arises that the testator intended to charge the entire residuary estate with the payment of the legacies, for the reason that, in such case, the residue can only mean what remains after satisfying the previous gifts." *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97.

It follows that under the will of Louis Roost, his widow, Anna Roost, received under item 15 of the will a devise in fee of the property involved in this action, and also a bequest of the $10,500 note and mortgage and the $11,000 contract of sale, charged with the payment of the legacies set out in items 6 to 14 of said will.

It further follows that Anna Roost had the right to mortgage said premises to the plaintiff, conveying her fee title therein, which was subject, however, to a charge for the payment of said legacies. Plaintiff's lien on said premises by virtue of its 1933 mortgage was subject to that charge.

Should the release of plaintiff's mortgage of 1923 be vacated and set aside, the lien of said mortgage revived and reestablished as a valid lien upon said undivided one-half interest formerly owned by Louis Roost, and the said lien, as so revived, be foreclosed?

The right of the beneficiaries to have this property applied to the payment of their legacies is derived from the will of Louis Roost. Their rights cannot be greater than his. At the time of the death of Louis Roost, his interest in the land was charged with the payment of this indebtedness. It is a "just debt" which his will ordered to be paid. Without that provision in the will, the law would require payment thereof. This indebtedness, therefore, was an obligation both under the will and by the lien of the 1923 mortgage superior to the rights received by the beneficiaries under the Louis Roost will. To grant the plaintiff the equitable relief prayed for will leave the defendants in the same position that they would have been in had the renewal mortgage not been executed and the original mortgage not been released. The beneficiaries have not

changed their position as a result of the renewal of this mortgage. They will not be deprived of any property rights given them under the will if the lien of the 1923 mortgage is reinstated.

No consideration passed from the Louis Roost estate, or any of the defendant beneficiaries, to the plaintiff for the renewal and release of the prior mortgage. The plaintiff's attorneys in 1928 and 1933 construed the provisions of the will correctly in holding that Anna Roost had a fee simple title to this property, subject to the lien of the 1923 mortgage. The attorneys made no reference in their opinions to the legacies. Their mistake appears to have been in finding that the legacies had either been paid, or payment secured by the assignment of personal property to the widow to be held in trust for the satisfaction of these legacies.

This mistake on the part of plaintiff's attorneys resulted in the plaintiff's releasing the 1923 mortgage and canceling the evidence of indebtedness secured thereby. The mistake was mutual as to plaintiff, Nuernberger, and Anna Roost.

The fact that the plaintiff filed no contingent claims in either the estate of Louis Roost or Anna Roost shows that plaintiff was looking to this land for payment. Plaintiff did not try to reach the other assets of either estate, or involve those assets in litigation or controversy to secure the payment of this indebtedness.

Legacies are payable first out of the personal estate of the testator. *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97. If there is not sufficient personal estate remaining to pay those legacies, it is due in part to the fact that the beneficiaries did not take any steps to preserve the principal of that estate.

The fact that collateral of the face value of $21,500 was assigned by the court to Anna Roost so that the same might be "preserved for distribution to the several devisees named in the will" might explain the opinion given by plaintiff's attorneys.

The parties intended the 1933 mortgage to be a renewal of the 1923 mortgage securing the payment of the original

indebtedness. In *Peoples Bank v. Trowbridge,* 123 Neb. 312, 242 N. W. 647, this court approved the following statement of law, which we quote from 41 C. J. 582:

"Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage."

Defendants raise the proposition that there was a change in the interest rate; that the plaintiff collected interest at the higher rate, and that that prevents the revival of the lien of the original mortgage.

"It may be conceded that an agreement for the payment of a higher rate of interest during extension is invalid as against a junior lienor in so far as it impairs the latter's security. * * * It is a very different thing to assert that such an agreement enhances the right of a junior lienor." *Barbano v. Central-Hudson Steamboat Co.,* 47 Fed. (2d) 160.

That proposition was presented in the case of *Lomas & Nettleton Co. v. Isacs,* 101 Conn. 614, 127 Atl. 6, wherein the court stated: "It is of course obvious that an extension of the loan would involve a change in the maturity dates of the note, and a change in the rate of interest *does not change the identity of the debt.*" (Italics ours.)

In *Cherry v. Welsher,* 195 Ia. 640, 192 N. W. 149, the court held: "The lien of the mortgage is presumed to continue until the debt is paid even though a new note be given therefor. The debt must be satisfied, and even the taking of a new note which includes an additional loan will not in the absence of an agreement to the contrary discharge the mortgage. It is elementary that, if the original mortgage is released through mistake, it may be restored in equity

and given its original priority, except as to subsequent purchasers for value and without notice."

Has an equity court the power to grant relief from the mistake of a plaintiff made under the circumstances of this case?

Pomeroy in his Equity Jurisprudence discusses the power of equity courts in matters of this kind and states:

Section 849. "I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. * * *

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal *status*, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

Section 853. "All mistakes of fact in agreements executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply,—its identity, situation, boundaries, *title*, amount, value, and the like." 2 Pomeroy, Equity Jurisprudence (4th ed.) secs. 849 to 854.

The case of *Peterson v. First Nat. Bank*, 162 Minn. 369, 203 N. W. 53, involved the power of an equity court to grant relief from the result of a serious blunder made by a lawyer in the foreclosure of a mortgage. In the body of the opinion the court said:

"The idea that equity has no relief from mistakes of law had its origin in the almost humorous and wholly supposititious presumption that all know the law—a proposi-

tion contrary to both law and sense. There has been misuse also of the rule that ignorance of the law excuses no one. There is such a rule, but it goes only to the extent of making legal duty inescapable because of the subject's ignorance of the law. Neither in letter, spirit, nor purpose does it justify or even suggest that a loss should be imposed on one and an unconscionable gain permitted another merely because of the former's ignorance of law."

In that case the syllabus is: "In considering the competency of equity to relief against mistake, it is not controlling that the initial error is one of law rather than fact. It is not so much the genesis of the error as it is its unintended and unconscionable effect upon legal rights and obligations that makes a cause for relief."

This court in *Lewis v. Newell,* 110 Neb. 142, 193 N. W. 105, states: "It must be conceded that ignorance of the law excuses no one and equity will not relieve against pure mistakes of law. However, a distinction is made as to ignorance of general law and ignorance of one's private legal rights under the law, arising out of existing facts. In the latter case, when shared by both parties to an agreement and resulting in a loss of the rights of one of them, the agreement may be set aside at the suit of the injured party, though no fraud was practiced upon him. 6 R. C. L. 630, sec. 48."

The decision of this court in *Farrell v. Bouck,* 72 Neb. 875, 101 N. W. 1018, indicates that it is something more than slight negligence on the part of a mistaken party that would prevent an equity court from granting relief. In that case, the expression "culpable inertness" is used.

In *Cherry v. Welsher, supra,* the court said:

"This record however shows a release of an unsatisfied encumbrance, and the lien so released will be revived for the benefit of the party satisfying it. Justice and equity require that this should be done. When a person through misapprehension and mistake of the law parts with or surrenders a right of property which he would not have surrendered but for such misapprehension a court of equity will grant relief if it is satisfied that the parties benefited

by the mistake cannot in conscience retain the benefits or advantages so acquired. * * *

"Equity looks to the substance of the transaction rather than the mere form it assumes."

An equity court has the power and the duty, under the circumstances of this case, to grant the relief prayed for by the plaintiff.

Therefore the case is remanded to the trial court with instructions as follows:

(1) To enter a decree canceling the release of the 1923 mortgage and reinstating the lien of the same upon the undivided one-half interest in this property, formerly owned by Louis Roost, and which, under the will, passed to Anna Roost as residuary devisee.

(2) That an accounting be had as to the amount due on the 1923 note under the terms and conditions of that note and mortgage, giving full credit for all payments of either principal or interest made to the plaintiff by either Nuernberger or Louis or Anna Roost; that there be deducted from the amount so found due the amount of payments made by Nuernberger and Anna Roost as commissions, renewal fees, and other expenses connected with the execution of the 1933 mortgage, and that the one-half part of the amount so determined be decreed to be a lien upon said undivided one-half interest, based upon, and with the priority of, the 1923 reinstated mortgage.

(3) That if said undivided one-half interest be not redeemed from said decree, that it be sold as by law provided to satisfy said decree.

(4) That upon the payment of one-half of the amount of the decree rendered in the district court against the defendant Nuernberger, either by redemption or sale, that decree be held to be fully satisfied.

(5) To enter such further order or orders as may be necessary in the premises.

By so providing, there will be but one recovery in this action for the plaintiff, and justice and equity will be done in the premises. Should there be sales of either or both of

these undivided interests and a surplus remaining after the payment of either decree, the trial court, upon confirmation, shall order the payment thereof to the party or parties entitled thereto.

The litigation in this matter, so far as these appellee defendants are concerned, has been caused by the mistake of the plaintiff. Therefore the trial court shall enter its decree, taxing costs as follows: (1) The costs of this action in the trial court incurred by the defendant administrator and defendant beneficiaries shall be taxed to the plaintiff; (2) all other costs already incurred in the trial court shall be taxed as a part of the costs of the case, chargeable one-half against each interest in the property; (3) the costs of this action in this court are taxed to the plaintiff; (4) the costs in this action hereafter shall be taxed as a part of the costs of the case, chargeable one-half against each interest in the property. In the event of a sale under orders of the court, the costs so charged shall be paid first out of the proceeds of the sale, before distribution thereof is made as provided above.

REVERSED.

FARMERS & BANKERS LIFE INSURANCE COMPANY, APPELLANT, V. MARLENE MATHERS ET AL., APPELLEES.
284 N. W. 286

FILED FEBRUARY 17, 1939. No. 30467.

1. Insurance: PLEADING. "Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312.
2. ———: ———: WAIVER. "If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.*, 126 Neb. 199, 252 N. W. 823.
3. ———. An insurance agent who writes in an application for life insurance and accepts false answers to questions pertaining

to the health of the applicant instead of the latter's truthful answers in good faith without knowledge of the falsehoods is the agent of the insurer issuing a policy on the application.

4. ———. Evidence of facts summarized in opinion *held* sufficient to support findings that an agent of a life insurance company wrote in an application for insurance false answers to questions instead of truthful answers of applicant.

5. Appeal. Where a jury renders a general verdict, the receiving of it without special findings on immaterial questions submitted is not prejudicially erroneous in that particular.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

Raymond W. McNamara and *Jochems, Sargent & Blaes,* for appellant.

Burkett & Robinson, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

The Farmers & Bankers Life Insurance Company, plaintiff, brought this suit to cancel a 1,000-dollar life insurance policy issued by it September 5, 1936, to Dorothy B. Mathers, insured, the beneficiary being her minor daughter, Marlene Mathers. Insured died December 4, 1936. Defendants are the beneficiary and her father and guardian, Lawrence Mathers.

The petition alleged among other things that insured issued the policy, received the premium, and agreed to pay the beneficiary $1,000 upon proof of insured's death; that the policy is in form "Non-medical," which is issued upon the written application and the questions and answers therein in lieu of a physical examination; that insured in her application for insurance, without the knowledge of insurer or its agents or its officers, knowingly made the false and fraudulent statement that she was in good health, and stated other falsehoods pertaining to her health, physical condition, habits and family history for the purpose of inducing plaintiff to insure her; that, contrary to her state-

ments in the application, she had not been in good health since 1928, having suffered continuously with goiter, for which two operations had been performed; that she died the day after the third operation for goiter; that she had been otherwise in poor health; that plaintiff relied on the false statements in her application for insurance; that otherwise, had the facts been stated truthfully in the application, the policy would not have been issued. The application and the policy are parts of the petition.

In an answer and cross-petition on the policy to recover the insurance, the fraud imputed to insured was denied by defendants and judgment for the insurance demanded. In a reply to the cross-petition, there was an affirmative plea for the cancelation of the policy and for a dismissal of the cross-petition.

Upon a trial of the cause, the jury returned a verdict for $1,054.50 in favor of defendants on the cross-petition. From a judgment therefor and from the allowance of an attorney fee of $500 in favor of defendants, plaintiff appealed to the supreme court.

On appeal plaintiff insists the application and the policy contain the condition precedent that the insurance does not go into effect, if the applicant for it is not in good health when the policy is issued, and that her poor health at that time and formerly was established by uncontradicted evidence. In this connection it is argued that the trial court ignored the condition precedent and committed prejudicial error in refusing to direct a verdict for plaintiff and in overruling a motion for judgment in its favor notwithstanding the verdict. The position thus taken is untenable for the following reasons: Plaintiff did not affirmatively plead a condition precedent. The failure to do so was a waiver of it. The petition itself waived condition precedent as an issue. It was not pleaded by plaintiff as a ground for cancelation of the policy nor as a defense to the cross-petition of defendants for insurance. Since it was waived by plaintiff, defendants were not called upon to plead a waiver and did not. The law in Nebraska is:

"Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451, 81 N. W. 312. Approved in *Lehnherr v. National Accident Ins. Co.,* 126 Neb. 199, 252 N. W. 823.

Insurer, under the cross-petition for insurance, was in the attitude of a defendant and was bound by the following rule of law:

"If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.,* 126 Neb. 199, 252 N. W. 823.

The trial court, therefore, did not err in omitting to submit to the jury or to decide the question of fact relating to the condition precedent, since it was not put in issue by the pleadings.

The only issue raised by the pleadings, tried by the parties and submitted to the jury was raised by the charges of fraud in the procuring of the insurance and the denial of the alleged fraud. The evidence on this issue was conflicting, but the preponderance was clearly in favor of defendants. The jury were at liberty to find from the evidence the following facts: In the transactions between insurer and insured, P. B. Craven was the authorized agent of insurer. He called on Dorothy B. Mathers and in the presence of others solicited insurance and wrote the answers to the questions in an application which he furnished. Insured told him in advance that she did not think she could pass a physical examination for insurance; that she had goiter and had operations for it. He said he had a policy that did not require a physical examination. He asked or omitted to ask questions in the application. She did not tell him she was in good health. She told him the truth about her health and goiter and operations and other subjects of inquiry. Craven wrote in the application the false answers indicating she was an insurable risk, handed the application to her and asked her to sign it. She did so without knowing

that falsehoods had been inserted instead of her truthful answers to questions. The scars of surgery for goiter were then on the applicant's neck. The person who committed the fraud was the agent of insurer and his fraudulent acts were the acts of insurer. *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451, 81 N. W. 312.

The verdict has abundant support in the evidence on the only issue of fact for the determination of the jury.

Complaint is made because the verdict was received without requiring findings in answer to special interrogatories. In view of the conclusions reached on the pleadings and on the controlling question of fact, the unanswered interrogatories were immaterial.

The attorney's fee of $500, however, seems to be excessive in view of the amount involved in litigation and the nature and extent of the professional services required and performed. The fee allowed in the district court is reduced to $200 and an attorney's fee of $100 for services of counsel for defendants in the supreme court will be taxed as costs, the costs in both courts to be paid by plaintiff. In other respects error prejudicial to plaintiff has not been found in the record. The judgment for insurance is

AFFIRMED.

ALICE GRAHAM, APPELLEE, V. CLIFFORD C. GRAHAM, APPELLANT.

284 N. W. 280

FILED FEBRUARY 17, 1939. NO. 30480.

1. **Divorce:** ALIMONY: MODIFICATION. "An application for a change with respect to alimony in a decree of divorce, made at a subsesequent term, must be founded upon facts or circumstances which have arisen subsequently to the decree, and in the absence of such facts and circumstances the matter will be deemed *res adjudicata* between the parties." *Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993.
2. ———: ———: ———. In a divorce proceeding, where a decree is entered dissolving a marriage, and awarding the wife

a judgment against the husband for a definite sum, in full of all her claims upon him or his property by reason of their former marriage relations, courts have no jurisdiction to vacate or modify such a judgment after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto.

3. ———: ———. "A decree for alimony * * * made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in the absence of statutory authority or a reservation of power in the decree itself." *Mayer v. Mayer*, 117 N. W. 890 (154 Mich. 386).
4. ———: ———. "Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction." *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773.
5. ———: ———. Record and evidence examined, and *held* ample to support the decree entered by the district court.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Good & Simons, for appellant.

Burkett, Wilson & Van Kirk and *B. Frank Watson*, *contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This was originally an action for divorce in which Alice Graham was plaintiff and Clifford C. Graham was defendant, both being residents of the state of Nebraska. It appears that two children had been born to these parties during the existence of the marital relations, a daughter, born June 11, 1919, and a son, born November 17, 1920, both of whom survive. The ground for divorce set forth in plaintiff's petition was cruelty committed by the husband against the wife, and included the allegation that defendant had been guilty of cruelty, "(d) By the removal of the said two children of plaintiff and defendant from Lincoln to York county, Nebraska, preventing plaintiff from seeing

her children or being with them. (e) By the removal of the said plaintiff's personal belongings and furniture purchased with her earnings from Lincoln to York without plaintiff's knowledge or consent." This petition also sets out, viz.: "That the defendant is able-bodied and in good health. That he is regularly employed and is capable of earning, as plaintiff is informed and verily believes, and does earn not less than $250 per month." It also alleges that on or about December 29, 1929, "defendant carried said children away to York county," Nebraska. That defendant has contributed nothing to the support of plaintiff, and has taken plaintiff's "personal belongings from Lincoln to York county without plaintiff's knowledge or consent. That the plaintiff is wholly without means to support herself and her minor children except for her earnings which are insufficient for that purpose." The prayer of this petition included a prayer for a divorce; that the court make a decree restoring to the plaintiff the whole of the personal estate that shall have come to the defendant by reason of marriage; for custody of the children, and for temporary and permanent alimony.

Personal service of summons upon the defendant was had, but he failed to plead and made default. The cause was tried to the district court on December 4, 1930, upon the pleading and the evidence, and such court on December 5, 1930, entered an absolute divorce, and further decreed, viz.:

"II. That the custody of the said minor children, Nadine and Roger, be awarded to the plaintiff, Alice Graham, but that the said children may remain where they are at the date of this decree, that is, Roger with his grandfather, Mr. Natt Graham, of McCool Junction, Nebraska, and Nadine at the Christian Home in Council Bluffs, Iowa, until such date as their mother, the plaintiff, is financially able to support them, said date to be determined by subsequent application to the court and by its order thereon.

"III. That the said defendant, Clifford C. Graham, shall pay the said plaintiff, Alice Graham, the sum of thirty dol-

lars ($30) on the first day of January, 1931, and thirty dollars ($30) on the first day of each month thereafter, until the full sum of five thousand dollars ($5,000) shall have been paid her, provided the said sum may be paid in a lump sum at any time, and fifty dollars ($50) on the first day of January, 1931, for her attorney fees herein. It is further ordered that in case the defendant fails to pay any one or more of the said sums ordered herein, execution may issue without prejudice to the right of the plaintiff to proceed against defendant as for contempt; also that defendant pay the costs."

We quote from the brief of the husband, viz.: "Defendant paid plaintiff nothing after the divorce decree except to return a few items of personal belongings and fifty dollars for attorney's fees and court costs. * * * Defendant inherited a one-fourth interest in his father's estate in York county, in August, 1937, after the divorce decree was transcribed to the district court of that county. A partition of the real estate was had and because of the cloud on the title the money is now held in the hands of the district court of York county, the sum being approximately $2,100, and being defendant's entire inheritance from his father's estate."

For the purpose of defeating the satisfaction of the decree out of this property, it appears that the defendant filed his application for a modification of the decree of December 5, 1930. A hearing was had on the pleadings and the evidence, and on March 18, 1938, a decree was entered awarding the custody of the minor children to the defendant, but otherwise continuing the decree of December 5, 1930, in full force and effect. The defendant alone appeals.

The defendant contends that the district court in so deciding erred in the disposition of the issues presented to it for determination, which he summarizes as follows, viz.:

"The main question before the district court of Lancaster county was whether the five thousand dollars mentioned in the decree was in the nature of a property settlement or whether it was an award for the support of the minor

children, which award was subject to modification by the district court, both as to accrued and unmatured payments; also whether the support and care furnished by defendant to said minors was in equity a payment of the money award provided for in said decree; and for a revision of said decree as to the custody of the children."

Accepting this statement of issues determined as a statement of fact, but without any commitment to the principles of law contended for therein, we find the record presented is free from reversible error.

Appellant's fundamental contention is that the district court had jurisdiction to modify and cancel the decree in this case under the provisions of section 42-324, Comp. St. 1929, which reads as follows: "After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, * * * and may make any decree respecting any of the said matters which such court might have made in the original suit."

This was originally enacted as section 27 of chapter LII of Part I, Code of Nebraska, by the territorial legislature, and was approved January 26, 1856. It was substantially a reenactment of chapter 84 of divorce of the Revised Statutes of Michigan for 1846, and the exact words of the section heretofore quoted appear as section 28 of such chapter of the Michigan statutes just referred to. The exact language of the controlling section (section 42-324, Comp. St. 1929) was construed by the supreme court of Michigan in 1864 in the case of *Perkins v. Perkins*, 12 Mich. 456, in the following language, viz.:

"The section must be construed to mean one of two things. It may be construed as empowering the court to change the decree for alimony, from time to time, on facts existing when the decree is granted, or on new facts thereafter transpiring; or as only authorizing a change on the latter, when they are of such a character as to make it necessary to

suit the new state of facts. The last we think is the true construction. We cannot suppose the first to have been in the mind of the legislature, as it would virtually take away the right of appeal, which the law gives to the party who may feel himself aggrieved by the decision of an inferior tribunal, and subject the rights of the parties to the discretion of the court making the decree, however arbitrarily or capriciously exercised. But as various circumstances might occur after alimony granted—as adultery on the part of the woman, or the loss of property by some inevitable accident on the part of the man, and the like—we are led to believe that the statute was intended to provide for such new circumstances, and that that was all the legislature had in view in enacting it; that it was not designed to affect the right of appeal, or to give to the court granting alimony power to review and to reverse or modify its own decree. Such a power would be unprecedented, and out of the ordinary course of judicial proceedings."

Two years after this Michigan decision had been announced, the Nebraska territorial divorce act of 1856 was, by an act entitled "An Act for revising, amending, consolidating and reenacting the Civil and Criminal Codes, and the laws of a general nature, of the Territory of Nebraska" (approved February 12, 1866), substantially reenacted without change. This act of 1866 is officially designated as the "Revised Statutes of Nebraska, 1866," and the exact language of section 42-324, Comp. St. 1929, appears therein as section 27, chapter XVI, Part I. While this section was amended in 1935, the language under consideration now was wholly unaffected by this amendment.

The terms of the original Michigan enactment were adopted in substance and effect by the legislatures of a number of the states. In the construction of these and kindred statutory provisions, it appears that the doctrine of *Perkins v. Perkins, supra,* has been generally adhered to. *Wilde v. Wilde,* 36 Ia. 319; *Reid v. Reid,* 74 Ia. 681, 39 N. W. 102; *White v. White,* 75 Ia. 218, 39 N. W. 277; *Fisher v. Fisher,* 32 Ia. 20; *Straus v. Straus,* 14 N. Y. Supp. 671;

Semrow v. Semrow, 23 Minn. 214; *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354; *Buckminster v. Buckminster*, 38 Vt. 248; *Weld v. Weld*, 28 Minn. 33, 8 N. W. 900; *Vert v. Vert*, 3 S. Dak. 619, 54 N. W. 655.

In 2 Nelson, Divorce and Separation, p. 888, the rule is announced, viz.: "In those states where the decree for alimony may be revised it is held that no change will be made unless it is shown that the wife's needs or the husband's faculties have increased or diminished. The decree is *res judicata* as to all matters existing at the time it was rendered. New facts occurring since the decree must be shown. The estoppel extends to all matters properly before the court which the parties might have litigated." See, also, 17 Am. Jur. 485, sec. 636; *Gundick v. Gundick*, 208 Mich. 34, 175 N. W. 168; *Clarizio v. Castigliano*, 201 Minn. 590, 277 N. W. 262.

However, in 1883, by the terms of an independent statute legislatively declared to be cumulative, the powers conferred on the courts and the legal effect of judgments rendered by them were increased, and it was provided: "All judgments and orders for payment of alimony * * * shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or *other action* or process as *other judgments*." (Italics supplied.) Laws 1883, ch. XL, sec. 1 (Comp. St. 1929, secs. 42-319, 42-320). See, also, *McCord v. McCord*, 128 Neb. 230, 258 N. W. 474.

This enactment created a decided innovation in our law as previously existing, and to that extent differentiates it from the other states which have adopted the Michigan divorce act as the basis of their law on that subject. The alimony judgment is legislatively endowed with the same qualities as "other judgments," and by the same authority may "be enforced and collected by * * * other action" as "other judgments" are. The obvious legislative intent is to secure for them "full faith and credit," and that divorce judgments in Nebraska should be considered as possessing all the qualities essential for that purpose. Unless unalter-

able in the jurisdiction of its rendition, an alimony judgment is not entitled to "full faith and credit." *Lynde v. Lynde,* 181 U. S. 183, 21 Sup. Ct. Rep. 555; *Sistare v. Sistare,* 218 U. S. 1, 30 Sup. Ct. Rep. 682; *Yarborough v. Yarborough,* 290 U. S. 202, 54 Sup. Ct. Rep. 181.

This statute is a remedial statute, and, being remedial, is to receive a liberal construction to carry into effect the purpose for which it was enacted, and for effectuating its object. *State v. Fremont, E. & M. V. R. Co.,* 22 Neb. 313, 35 N. W. 118; *Becker v. Brown,* 65 Neb. 264, 91 N. W. 178.

It is obvious that, so far as not inconsistent with the express terms and recitals thereof, to construe an alimony judgment in favor of the wife as unalterable is in harmony with the legislative intent thus expressed. It will also be noted in passing that this court has consistently given full force and effect to the statute here under consideration from the date of its adoption. *Nygren v. Nygren,* 42 Neb. 408, 60 N. W. 885; *Lynch v. Rohan,* 116 Neb. 820, 219 N. W. 239; *McCord v. McCord,* 128 Neb. 230, 258 N. W. 474.

Quite consistent with the current of authority, this court in *Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993, announced the principle, viz.: "An application for a change with respect to alimony in a decree of divorce, made at a subsequent term, must be founded upon facts or circumstances which have arisen subsequently to the decree, and in the absence of such facts and circumstances the matter will be deemed *res adjudicata* between the parties." See, also, *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428.

Again, in *Beard v. Beard,* 57 Neb. 754, 78 N. W. 255, this court determined, viz.: "Where, in a divorce proceeding, a decree is entered dissolving a marriage, and awarding the wife a judgment against the husband for $..... in full of all her claims upon him or his property by reason of their former marriage relations, it seems that the courts have no jurisdiction to vacate or modify such a judgment, after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto."

It is also a universally accepted principle that "A decree for alimony * * * made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in the absence of statutory authority or a reservation of power in the decree itself." *Mayer v. Mayer,* 117 N. W. 890 (154 Mich. 386), 129 Am. St. Rep. 477, 19 L. R. A. n. s. 245.

However, appellant challenges the application of the rule of *Beard v. Beard, supra,* to the facts here presented, for the reason that the award of alimony in the instant case was not in the nature of a property settlement between husband and wife, but was in fact for the support of minor children, and, as such, subject to modification at any time, both as to future and matured payments; further, that the defendant had no property at the time of the original rendition of the divorce decree, and the petition for divorce lacks necessary allegations which would support a judgment for a property settlement, and that "the purported judgment is a nullity and void as far as being a property settlement." In support of this last proposition, *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, 55 N. W. 218, and *Branz v. Hylton,* 130 Neb. 385, 265 N. W. 16, are cited. It is thought that the principles evidenced by these decisions are wholly inapplicable, both because of the inherent nature of divorce proceedings and the statement of the pleading challenged. From the petition in the instant case we note that it is alleged on information and belief that the defendant is able-bodied and in good health, capable of earning, and is earning, $250 a month; and, further, the removal of plaintiff's personal belongings and furniture, purchased with plaintiff's earnings, from Lincoln to York, Nebraska, is alleged, with a special prayer for relief relating thereto. True, the personal belongings and furniture are not described, enumerated, or valued, but no attack has been made upon this petition in that regard until after final judgment was entered thereon.

The general rule appears to be, viz.: "Failure to allege the value of property, or to lay damages in a declaration

or complaint will be cured by verdict and the same is true of a declaration or complaint which is defective or not sufficiently specific in stating value or damages." 49 C. J. 881.

So, also, with reference to the failure of plaintiff to specifically enumerate or describe "plaintiff's personal belongings and furniture," carried away by defendant and presumably continuing in his possession and under his control, the controlling principle of pleading appears to be, viz.: "Facts which are, or which the law presumes to be, peculiarly within the knowledge of the other party may be alleged with less certainty and particularity than would otherwise be necessary, or may be alleged on information and belief; and they may even be omitted entirely." 49 C. J. 38.

In *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773, in a direct appeal from a decree of divorce and alimony, we find the following, viz.: "A complaint is based on the order allowing the plaintiff the household furniture in her possession at the time of the decree. The defendant insists that this portion of the decree is outside the issues, because this furniture was not mentioned in the petition. Where the court has jurisdiction of the parties, authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction. It is not necessary that each item of personalty be specifically mentioned in the petition. The evidence discloses with reasonable certainty the amount of household furniture." See, also, *Maxwell v. Maxwell*, 106 Neb. 689, 184 N. W. 227.

Whether the relief in such case is an assignment of definite articles of personal property or a monetary decree in lieu thereof is a matter resting in the sound discretion of the court.

In *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22, the rule is announced, viz.: "In considering the amount of alimony that a court is to allow in such a divorce case, the court will take into consideration the estate of each party at the

time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties."

The evidence adduced at the original trial of this instant divorce proceeding has not been preserved, and is not shown in the present record. The presumption, however, obtains that it was ample to sustain the judgment entered. The claims of plaintiff on account of her personal property necessarily formed an element of the problem considered by that court, and the decree rendered thereon necessarily constituted a property adjustment made between the parties. Indeed, the allegations contained in plaintiff's petition in reference to the husband's earning power constituted alone, without reference to ownership of property by him, an ample basis for award of alimony. *Lape v. Lape*, 99 Ohio St. 143, 124 N. E. 51.

The defendant in the instant case, as petitioner for revision and alteration, carries the burden of proof to establish the alterability of the decree. It is thought that he has failed in his contention that the rule announced in *Beard v. Beard, supra,* is inapplicable.

Nor are we impressed with the argument that the award of alimony is for the benefit of the minor children, and subject to revision as such. By our statutes, in a divorce decree, an award of alimony may be either permanent or temporary, and may be for the support of the wife, or of the children, or both, whether temporary or permanent. Comp. St. 1929, secs. 42-310, 42-311, 42-318, 42-323, 42-324.

In the instant case the award of alimony was made to the wife only. The express terms of the decree are "That

the said defendant, Clifford C. Graham, shall pay the said plaintiff" a definite sum of money ($5,000) in payments of $30 a month, commencing on January 1, 1931. The minors are not mentioned in any manner as beneficiaries in connection with the award, and while another distinct paragraph of this decree awards a technical custody of the two children of these parties, even that is in truth and fact "suspended" until further order of the court. The decree expressly provides that these minors may remain in the custody of those where they had been previously placed by the father, "until such date as their mother, the plaintiff, is financially able to support them, said date to be determined by subsequent application to the court and by its order thereon."

But, without reference to or consideration of this situation thus created, the terms of the alimony award direct that the payment of $30 a month to the wife shall commence on January 1, 1931, and shall thereafter be made regularly for the period of 166 2/3 months. The last payment under the terms of this decree is payable in October, 1944. Meanwhile the two children will attain their majorities on June 11, 1940, and November 17, 1941, respectively.

Thus, not only the express terms of the decree but the surrounding circumstances tend to sustain the conclusion that the award of alimony in the instant case, as authorized by the express terms of the controlling statute, was made to and for the wife, and not for the benefit and support of the children. Therefore, expenditures made by the father for the support and maintenance of the children while actually in his possession and under his control may not be treated as credits on the alimony award or considered as a satisfaction *pro tanto* thereof. This conclusion as to the inherent nature of the award of alimony is quite in harmony with the directions to the district courts of this state announced in *Connett v. Connett,* 81 Neb. 777, 116 N. W. 658, viz.: "The wife's alimony and the children's maintenance, if included in the same decree, should be separated

into distinct items, and not included in one sum." In determining the meaning of a decree, in the absence of any facts disclosed in the record to the contrary, compliance with this direction may be assumed.

It follows that the judgment of the district court, so far as here presented for review, is correct, and is

AFFIRMED.

HARRY MASON, APPELLANT, V. CLYDE REYNOLDS ET AL., APPELLEES.

284 N. W. 257

FILED FEBRUARY 17, 1939. No. 30421.

1. **Witnesses.** Where a witness, previous to the trial, has made a written statement, duly signed, favorable to the contention of the party calling him, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement to refresh his memory, or to probe his conscience, as well as to show to the court and the jury the reasons which induced him to call such a witness to the stand.
2. **Automobiles.** If injury is caused through the combined negligence of the drivers of two automobiles, cause of action is joint and several, and recovery may be had against either or both.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Dent & Deakins and *William E. Shuman,* for appellant.

Beeler, Crosby & Baskins, Robert B. Crosby and *Hoagland, Carr & Hoagland, contra.*

Heard before ROSE, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

PAINE, J.

Action for damages, brought against two young men who, while racing their cars, ran into plaintiff's car, and also against the owners of the two cars driven by the young

men. At the close of the plaintiff's testimony a motion was made to dismiss the action, on the ground that there had been a misjoinder of causes of action, together with several other motions, all of which were sustained by the court. Jury returned verdict finding in favor of each defendant as instructed by the court. Plaintiff's action was thereupon dismissed by the court. Plaintiff appeals.

The plaintiff's evidence discloses that on March 14, 1937, about 4 o'clock in the afternoon, plaintiff was driving a 1930 Model A Ford two-door sedan on East Second street in the city of North Platte, and while there were still residences on each side of the street, it was just outside of the city limits proper. The road was graveled, and about 22 feet wide, and plaintiff was driving slowly, perhaps 10 to 15 miles an hour.

Plaintiff was within 30 or 40 feet of the driveway into the home and place of business of William E. Thompson, a car wrecker, where he intended to get some repairs. Looking in his rear-vision mirror, plaintiff saw the first of two cars coming about 200 to 300 feet behind him, but he did not hold out his hand, because the car was coming too fast, and he intended to let it go by. Within two or three seconds after he saw the car in his rear-vision mirror, it flashed up alongside of him, and he has a memory of some one, with face turned towards him, laughing. The first he remembered clearly after that was some time during the night, when he became conscious at St. Mary's Hospital.

Mr. Thompson, proprietor of the car-wrecking place to which plaintiff was going, testified that he saw the plaintiff in his car, and that the Oldsmobile coupé struck the front of the Ford car, which turned it sidewise, leaving it in about the center of the street; that the Oldsmobile blew out a tire and went into the ditch on the south side of the road; that the Dodge, just behind, hit the Ford pretty heavily and broke off the posts under three mail-boxes, and went on about 100 feet and stopped in the ditch. Mr. Thompson ran out to the Model A Ford and found the plaintiff had been thrown into the back end of the car, and, while

not exactly unconscious, he wanted to know what had happened, and Rev. Kana, a Japanese minister, who lived across the street from Mr. Thompson, took him to the hospital.

James G. Dietz testified that the two cars were coming down the street at between 60 and 70 miles an hour. They were throwing up considerable dust. They were side by side at first, but one was a little ahead of the other at the time the accident occurred. He said that he was a little over a block away, and did not actually see it, but heard it.

The plaintiff called in evidence Richard Allen, 18 years of age, a senior in the high school, who was riding in the Dodge automobile, and gave the names of the two boys and the two girls who were riding in the Dodge. He testified that, before they drove off the end of the pavement, Moore passed them in the Oldsmobile; that he thought the Dodge was running 40 to 50 miles an hour, and did not change any when it struck the dirt road. When the Oldsmobile passed the Dodge it threw gravel on the windshield. In his opinion, the Oldsmobile was "doing somewhere around 70" when it passed them; then Reynolds increased the speed of the Dodge to 50 or 55, and hit the Mason car, which witness Allen had seen just before the Oldsmobile passed them, but could not see it just before they hit it, for the dust was so thick he could not see a thing, and was knocked out by the collision. He testified that Raymond Reynolds' four-door Dodge sedan was owned by his father, Clyde Reynolds, and that Raymond lived with his father.

Raymond Reynolds testified that he was 19 years of age, and lived with his father and mother, and that his father owned the 1936 model Dodge automobile that he was driving, but that he had only driven the Dodge once before, which was about three months before the accident. He said that his father was asleep, and he took the car without his consent. He had had a driver's license since he was 16 years old. He had dropped out of high school, and had been working for his father, eating and sleeping at home, and paying his own board at the rate of $9 a week. He delivered groceries for his father's store in a truck. He

said that the truck was sitting in front of his father's car, and so he took his father's car without permission. He claimed that he bought the truck through his father; that they traded in another car, which was licensed in his father's name, but that he had made the payments on it each week through his father.

The plaintiff offered to show by the witness on the stand that, after the truck was purchased from the Alexander Motor Company, it was involved in an accident, and that Clyde Reynolds, father of the witness, swore under oath that he was the sole owner thereof, and collected from the insurance company as the owner. The plaintiff stated that he made this offer to prove for the purpose of impeaching the witness upon the stand, who appeared unfriendly. This was objected to as incompetent, irrelevant, and immaterial, and the court sustained the objection to the offer on the ground that "you can't impeach your own witness."

The witness testified that, while he did not look at his speedometer, he always had the habit of driving around 50 miles an hour. He testified that when they left the pavement the Oldsmobile, going at that time around 70 miles an hour, went by him and honked the horn.

Plaintiff then laid a foundation for the introduction of exhibit No. 1, being a typewritten statement, signed by this witness. He admitted making a statement in attorney Deakins' office a few days after the accident, and admitted it was his signature at the bottom of exhibit No. 1, just above the line reading, "I have read the above and it is true."

Plaintiff then offered in evidence exhibit No. 1 for the purpose of impeaching the witness, on the ground that plaintiff had been surprised by his testimony, which was absolutely contrary to the written statement given, and insisted that plaintiff had a right to impeach a witness when he is hostile, and when plaintiff is surprised by his testimony. Defendants objected to the offer as incompetent, irrelevant, and immaterial, not binding upon the defendants, and for the further reason that it is an attempt on

the part of the plaintiff to impeach his own witness. The objection was sustained by the court.

Exhibit No. 1 was about two typewritten pages in length, and it was signed, "Ray Reynolds." It stated that he was 18 years of age, had graduated from the North Platte high school two years before, was employed by his father, driving a delivery truck for the grocery; that the Dodge sedan he was driving was owned by his father, and used as a pleasure car, and at the time he was driving it it was with his father's permission; that at the time of the accident he had speeded up his car to 50 to 55 miles an hour, and that Moore passed them as though they "were standing still;" that in his judgment Moore was going 75 to 80 miles an hour, with his back wheels jumping back and forth across the road; that he could not tell whether plaintiff Mason's car was stopped or moving because of the dust; that the dust was so bad he could not even see his radiator cap; that he did not see Moore hit Mason; that just as he put his foot clear down on the brake pedal he struck the Ford Model A, which threw his car over into the left ditch, knocked over some mail-boxes, and the first thing he noticed about the Moore car was that it had slid sidewise about 90 feet, and had turned clear around and was facing in a westerly direction, while Mason's car was on the south side of the road, facing in a northerly direction.

At the close of plaintiff's evidence, motion was made for a directed verdict for the father, Clyde Reynolds, on the ground that plaintiff had not proved any family car relationship, or that the son was using the car with the consent of the father.

A motion was made to direct a verdict in favor of Raymond Reynolds and Clyde Reynolds on the ground that there had been a misjoinder of causes of action, and no joint enterprise, no concert of action, and no indivisible injury or damage had been shown. "The Court: The motion will be sustained as to the father." Thereupon, a similar motion was made on behalf of Harry Haffner, because evidence fails to show any connection with defendant Moore

(who was driving Haffner's Oldsmobile), and the further motion that no joint enterprise has been shown, and further, because there is a misjoinder of causes of action, and that the four defendants are not joint tort-feasors. "The Court: It seems to the court's mind that the court should sustain this motion and all the motions."

The question of whether counsel may introduce a previous inconsistent written statement of a witness who had materially changed his testimony from a statement he had signed before the trial was fully discussed in *Stanley v. Sun Ins. Office,* 126 Neb. 205, 252 N. W. 807. It is true the general rule in Nebraska had been against allowing such impeachment of a witness. *Nathan v. Sands,* 52 Neb. 660, 72 N. W. 1030; *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717, 164 N. W. 719. We find a 45-page historical discussion of this question in 2 Wigmore, Evidence (2d ed.) 252-297.

Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265, settled the rule in Nebraska, as follows: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial."

To this holding we may add the reasons therefor: Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason of refreshing his memory, probing his conscience, and, if for no other reason, that he may show the court and jury the circumstance which induced him to call and vouch for such a witness. *Stanley v. Sun Ins. Office, supra.*

The ruling of the court in refusing to allow exhibit No. 1 to be received in evidence was prejudicial error, which requires a reversal of this case.

The question is raised, in the motion upon which the case was dismissed, as to whether there was a joint enterprise, and whether the drivers and owners of the cars causing the damage to the plaintiff were joint tort-feasors. This court has had this same question before it a number of times. *Schweppe v. Uhl,* 97 Neb. 328, 149 N. W. 789, involved an accident which occurred August 18, 1911, and was one of the early cases involving automobiles. Plaintiff was driving a team of horses attached to a wagon, and at a narrow place the defendants, each driving an automobile, came up from the rear and, by excessive rate of speed and loudly sounding the horns, frightened the team, which ran away, throwing plaintiff out, from which he suffered injuries. In this decision there is a citation from 1 Cooley, Torts (3d ed.) 247, which says: "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action."

This court has held that, if separate, independent acts of negligence combine to produce an injury, each defendant involved therein is responsible for the entire result, even though the act of one alone might not have caused the injury. *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695.

In *Olson v. Hansen,* 122 Neb. 492, 240 N. W. 551, a farmer was driving his team, attached to a mower, along a public highway. Two cars, driving in the opposite direction, approached him. The driver of the first car stopped to visit with Olson, whereupon the second car collided with the first car in attempting to go around him, throwing the first car against the mower and injuring Olson, and it was again held: " 'An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.' *Schweppe v. Uhl,* 97 Neb. 328."

In *Simmons v. Leighton,* 60 S. Dak. 524, 244 N. W. 883, it is said: "If injury was caused through combined negli-

gence of drivers of two automobiles, cause of action is joint and several, and recovery may be had against either or both." See, also, Berry, Automobiles (4th ed.) sec. 221.

In view of the evidence produced by plaintiff, and the authorities, we are inclined to the view that the trial court was not warranted in dismissing the action at close of plaintiff's evidence. Many other errors are relied upon for reversal, but it will be unnecessary to discuss them, for in another trial they may not occur. The cause is

REVERSED AND REMANDED.

MARY E. SWELEY, APPELLANT, V. JOHN W. FOX ET AL., APPELLEES.

284 N. W. 318

FILED FEBRUARY 17, 1939. No. 30481.

1. **Limitation of Actions.** Section 20-207, Comp. St. 1929, provides a four-year limitation in which actions for relief may be brought to reform on the ground of fraud. Actions for accident or mistake, not specifically mentioned in the statute, are classed with fraud, and limited to four years. *Ainsfield v. More*, 30 Neb. 385, 403, 46 N. W. 828.
2. ———. The recording of a real estate mortgage is not of itself, under all circumstances, sufficient to charge all parties with notice of a mistake therein, but, when accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to discovery of the mistake, the statute of limitations begins to run from the recording of the mortgage, but not otherwise.
3. **Mortgages: REFORMATION.** To warrant reformation of a mortgage for mutual mistake, the proof must be clear, convincing, and satisfactory.

APPEAL from the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Lamont L. Stephens and *W. H. Line*, for appellant.

R. H. Mathew, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action in equity to reform a real estate mortgage by inserting the description of an improved 80 acres which, it is claimed, was omitted therefrom by mutual mistake, and to reform the proceedings in a foreclosure case brought on said mortgage, or, in the alternative, to foreclose the mortgage as reformed. The defense was that the plaintiff was guilty of laches, that she did not offer to do equity, that the statute of limitations had run, and that there was no such clear, certain, and convincing evidence as is required to support a decree of reformation of an instrument. The trial court found for the defendants, and dismissed the plaintiff's supplemental petition for reformation. The plaintiff appeals on the ground that the judgment entered was not supported by the evidence, and is against the weight of the evidence, and is contrary to law.

The evidence discloses that prior to 1929 John W. Fox, defendant, owned 320 acres of land five miles south of Litchfield, being the southeast quarter of section 21 and the northeast quarter of section 28, the whole farm being four 80-acre tracts of land lying north and south. The two south eighties were grass or pasture land, but worth in 1930 about $30 to $35 an acre. The north eighty was all plow land, and part of it very good farming land, and it was at that time worth perhaps $50 an acre, and was mortgaged for $1,500. The fourth eighty, being the second one from the north, was good farm land, with all the improvements thereon, consisting of a dwelling-house, barn, chicken-house, hog-house, windmill, etc., and the entire farm of 320 acres was worth in 1930 around $20,000.

In March of 1929, when Fox was planning to buy the Criffield filling station at Hazard for $7,000, a loan from the Lincoln Trust Company was approved for $8,000 on the whole 320 acres, but the deal fell through, and he never completed the loan. Fox bought a filling station in Litchfield in July, 1929, for $2,775, and he borrowed $3,000 for six months of the First National Bank of Litchfield, D. W. Titus, president, giving the bank a mortgage on the two

south eighties and on the north eighty, but the mortgage did not include the 80 acres with the buildings. In reference thereto, Mr. Fox gave this answer: "Well, the reason I kept that eighty out was—didn't mortgage that eighty—was because that was my home, and my house and my barn was there, and I thought if I lost the rest of the stuff in this gasoline venture I would still have a little home left."

When its mortgage of $3,000 became due, the bank undertook to assist Mr. Fox to secure a new loan for him from Harry Sweley, husband of the plaintiff. Mr. Engleman, a bank employee, called Mr. Sweley on the telephone and talked with him about making the loan to Mr. Fox, and Mrs. Sweley testifies that he told her, after telephoning, that the bank wanted him to make a loan of $3,000 on the improved eighty and the two south eighties of grass land owned by Mr. Fox. He agreed to make the loan, and Mr. Engleman in the bank drew the mortgage to Mr. Sweley of $3,000 at 6 per cent., but has no recollection whatever of the transaction. The mortgage was dated January 31, 1930, and recorded February 4, 1930, and this mortgage was given on the same three unimproved eighties of land which had been mortgaged to the bank for $3,000, and did not include the eighty which was the home place. It is, therefore, undisputed that Mr. Sweley never at any time had a mortgage upon the home place.

Mr. Sweley died, and his widow, the plaintiff herein, secured the interests of the other heirs, and became the absolute owner of the mortgage, and, the same being in default, it was foreclosed, and a regular stay was taken, and then a moratory stay taken, and the sale was not confirmed and a deed issued to her until October 7, 1937.

After she secured the sheriff's deed, the plaintiff went to the county treasurer's office to pay her taxes, and for the first time learned that she did not own the improved eighty, being the second eighty from the north. A few days thereafter she brought this action to reform the mortgage, reform her foreclosure proceedings, or, in the alternative, to foreclose the mortgage as reformed.

The plaintiff, to establish her claim for a reformation of the mortgage given in 1930 on the ground of mutual mistake, relies upon the telephone conversation which she says she heard between Mr. Engleman and her husband about making the loan to Mr. Fox. The attorney for plaintiff, in offering this testimony, claimed it was *res gestæ* and part of the transaction. Judge Hostetler, trial judge, said it was hearsay, and was not in the presence of Mr. Fox, and was just what somebody told her, and he did not think it was *res gestæ,* but allowed the testimony to be given on the ground that in a trial to the court it would not be error.

Aside from this telephone conversation which plaintiff testifies Mr. Sweley had, not with the defendant Fox, but with an officer in the bank whose loan Mr. Sweley was taking up, the plaintiff places weight upon two applications for insurance upon his buildings. The first one is dated September 5, 1931, and the second one is dated October 1, 1936.

The first policy of insurance was taken out by Mr. Fox over 19 months after the mortgage had been given to Mr. Sweley. Mr. Fox went to the bank, asked for fire and tornado insurance on his buildings, and the clerk in the bank filled out the application. This was not done at the request of Mr. Sweley at all. The first application, dated September 5, 1931, was for $1,000 on the house and $1,000 on the barn, and there were a large number of questions to be answered and blanks to be filled in on the application. "Cash Value—Land and buildings $16,000. No. of acres in farm? 320." To the question, "How many acres on the farm are tillable?" he answered, "160." He stated in the application that he had owned the farm for 15 years, and that it was incumbered for $4,500. Counsel for defendant insists that all of these answers were true, and described the situation of the whole farm of 320 acres; that there was a first mortgage on the north eighty of $1,500, and that there was a $3,000 mortgage upon the three unimproved eighties of the farm, which made a total of $4,500 incumbrance upon the farm, but the application did not

say that the 80 acres where the buildings were located were incumbered, and counsel for defendant argues that, when a clerk in a bank is filling in all of the information needed in an application for a fire insurance policy, it is not made out as carefully as an instrument conveying title. When he came to the question, "Name and address of mortgagee?" he filled in the name, "Harry Sweley," and attached a "Loss payable clause" to him to the policy.

This insurance policy expired in 1936, which was after Mrs. Sweley had started proceedings to foreclose this mortgage of $3,000, and about that time Mr. Fox went to her to get her to sign papers so that he could get a loan through the Federal Farm Loan Association, and she asked him about renewing the insurance on the buildings, and she says that he told her that that would be up to her to get the insurance, and she went to Mr. Lang in the bank when she found the policy would expire on September 5, 1936, and Mr. Lang agreed to get Mr. Fox to sign an application for a new policy. He filled in the application blanks. "No. of acres in farm? 240. * * * Incumbrance—Is the land incumbered? Yes. If so, what amount? $3,000. * * * Name and address of mortgagee? Mary Sweley, Litchfield, Nebr.," and a loss payable clause was made to her.

Counsel for defense suggests that perhaps Mr. Fox was then willing that she should have insurance on the buildings as additional security for her mortgage, even though she did not have a mortgage on the land, provided she paid for the insurance; or perhaps he did not even think at all, but just signed the application as they made it out.

Plaintiff claims that she understood at all times that the mortgage given to Mr. Sweley covered the eighty with the buildings on, or she would not have paid $15 premium for the new policy.

It appears from the evidence that Mr. Fox endeavored to get a loan from the Federal Land Bank upon all four eighties of his farm; that they offered to loan him $4,000; that to clean up the balance on the $1,500 loan, which was a first mortgage on the north eighty, it did not leave him

sufficient to take up Mrs. Sweley's mortgage in full; that he went to see her and told her that, if she would sign up the papers required by the government, he could get the loan, and it would leave him short about $270 of paying off her mortgage, and that she refused to accept this deduction, although he promised to pay the balance later whenever he could get the money.

Section 20-212, Comp. St. 1929, provides a limitation of four years on all actions not thereinbefore provided, while section 20-207, Comp. St. 1929, sets out that an action for relief on the ground of fraud may be brought within four years, and that the cause of action shall not be deemed to have accrued until the discovery of the fraud. In Cobbey's Ann. Code, sec. 1011, he entitles this section, "Actions for trespass on real property." And Chief Justice Cobb, in *Ainsfield v. More,* 30 Neb. 385, 403, 46 N. W. 828, says: "Actions for relief on the ground of accident or mistake are not specifically mentioned in the statute, but these three, fraud, accident, and mistake, have been always classed together as the three great fountains of equity jurisprudence."

In *Wright v. Davis,* 28 Neb. 479, 44 N. W. 490, it was held that the fraud will be deemed to have been discovered when such facts are known as would naturally suggest such inquiries as, if followed up, would lead to such knowledge.

If the fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit of his cause of action if his failure to discover it is attributable to his own neglect. 17 R. C. L. 858, sec. 218; 44 A. L. R. 78, Ann.; 106 A. L. R. 1338, Ann.

In *Forsyth v. Easterday,* 63 Neb. 887, 89 N. W. 407, it was said: "The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary in-

telligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise." This appears to be the general rule, but in *Wood v. Carpenter,* 101 U. S. 135, and in Iowa, Kansas, Missouri, and many other states it is held that constructive notice arising from recording imposes upon the creditor the duty to investigate, and charges him with knowledge of the fraud. See 76 A. L. R. 870, Ann.

To reform a written instrument on the ground of mutual mistake, the burden is on the party alleging mistake to prove that the written instrument does not fully or truly state the agreement or intention of the parties. The precise terms of the contract must be proved. There is always a presumption arising from the instrument itself that it sets forth correctly the agreement of the parties. 23 R. C. L. 365, sec. 65.

"Much stronger and clearer evidence is required than in an ordinary suit for damages; * * * reformation is never granted on a probability." 23 R. C. L. 367, sec. 67. In *Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520, 213 N. W. 750, this court held: "To justify reformation of a written instrument requires proof that is clear, convincing and satisfactory." See *Wheeler v. Brady,* 126 Neb. 297, 253 N. W. 338, to the same effect.

Defendant Fox denies that he ever intended to give Sweley a mortgage on his home place. There was no evidence of any agreement between them. Sweley simply bought a mortgage from the bank which covered the same three eighties the bank had held a mortgage on.

The mortgage in possession of the plaintiff for all those years plainly described the three unimproved eighties. She verified her petition for foreclosure, which had the same description. The heirs assigned to her their interest in the same land. The decree of foreclosure, the notice of sale, which was published for five weeks, the confirmation, and the sheriff's deed, all set out definitely the same three unimproved eighties, which she could have seen at a glance,

yet she never discovered the alleged error until she went to pay the taxes after she got the sheriff's deed. We are constrained to believe there was laches in bringing the action.

An interesting question arises as regards the rights of the wife, for at the time John W. Fox gave the Sweley mortgage on the three unimproved eighties he was living with his wife, Fannie E. Fox, on their homestead on the improved eighty. There has been no evidence called to our attention which connects her in any way with the giving of any mortgage on her homestead.

In our opinion, the evidence is not clear or convincing that any mistake was ever made, much less a mutual mistake, and the court is convinced that the trial judge, who saw and heard the testimony of the witnesses, decided the matter correctly, and the judgment of the district court is hereby

AFFIRMED.

JAMES POULTRY COMPANY, APPELLANT, V. CITY OF NEBRASKA CITY, APPELLEE.
284 N. W. 273

FILED FEBRUARY 17, 1939. No. 30381.

1. **Eminent Domain**: LEASEHOLDS: DAMAGES. The words "or damaged" in section 21, art. I of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of a leasehold.
2. ———: ———: ———. In determining the amount of such damages, the jury may consider the diversion of travel, inconvenience of access and diminution of business carried on upon such leasehold, not as independent items of damage, but for the purpose of determining the market value of the leasehold immediately before and after the construction of such improvement.
3. ———: ———: ———. Where a leasehold has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such lease-

hold immediately before and immediately after the completion of the improvement from which the injury results.

4. ———: ———: ———. Whatever reduces the market value of a leasehold by the injuring of it for a public use may be considered in determining the compensation to which the owner of the lease is entitled, where he suffers damage not common to the public generally.
5. **Contracts**: MODIFICATION. "'Where a contract (lease) is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determine their liabilities.' *Van Hoesen v. Cameron*, 54 Mich. 609, 614." *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.*, 114 Neb. 584, 208 N. W. 742.
6. **Landlord and Tenant.** The mere opinion of the parties as to the construction of a lease, not carried into effect by any action, will not amount to a practical construction.
7. **Eminent Domain**: LEASEHOLDS: DAMAGES. A lease, with the right of either party, under the provisions thereof, to terminate it on or after the date of the fixed term by serving of 30 days' advance notice on the other party, is a lease for a definite term, and the damage to the leasehold is based on the unexpired term of the lease.
8. ———: ———: ———. Anticipated profits from the continued carrying on of a business in an established location on a leasehold cannot be considered in estimating damages.
9. ———: ———: ———. Evidence of the volume of business transacted on a leasehold may be shown, not as an independent item of damage, but as it affects the market value of the leasehold before and after the construction of the improvement.
10. **Evidence.** The testimony of witnesses, properly qualified and with proper foundation laid therefor, is admissible where such testimony relates to the nature, kind and volume of business carried on upon the leasehold.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed.*

Frank A. Hebenstreit, Thomas E. Dunbar and *Kennedy, Holland, De Lacy & Svoboda*, for appellant.

Varro E. Tyler and *Raymond Frerichs, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is a condemnation proceeding. The property in question is a leasehold on lots 4, 5 and 6, in block 79, Hail & Company's addition to Nebraska City, Nebraska, on the Missouri Pacific Railroad Company's right of way. The city of Nebraska City authorized by ordinance the construction of a viaduct. Trial was had to a jury, resulting in a verdict and judgment in favor of the plaintiff for $7,500, from which verdict and judgment the plaintiff appeals.

The pleadings admit that plaintiff is a Nebraska corporation and, since July 25, 1931, has been engaged in buying and selling gasoline, oil and automobile accessories at wholesale and retail, and in the buying, processing, dressing and selling of poultry, eggs, cream and kindred products in the city of Nebraska City. The business is located on South Eleventh street in said city, adjoining the right of way of the Missouri Pacific Railroad Company, and is carried on in a story and a half concrete, stucco and steel building, approximately 100 feet long and 40 feet wide. The defendant denied that the building was constructed of concrete, stucco and steel. The real estate, exclusive of the buildings, was leased by the plaintiff from the Missouri Pacific Railroad Company, and the improvements placed thereon were the plaintiff's, including necessary oil pumps, oil station, gasoline, kerosene and tractor fuel bulk tanks, unloading pumps and equipment, refrigeration equipment, cream-testing equipment, and all fixtures necessary and incident to such line of business. The lease was for a period of 10 years. In this connection, plaintiff alleged that the lease was continuing and set forth evidentiary facts in its amended petition to sustain such contention, the court striking such allegations from the petition and limiting the period of the leasehold to the unexpired term. This contention will be further summarized in the opinion, together with pertinent evidentiary facts upon which the plaintiff predicates error.

The second amended petition alleges the building of the

viaduct along the length of South Eleventh street immediately to and on the west side of the premises of plaintiff. The viaduct project contemplated the building of a reinforced concrete viaduct of an elevation of about 30 feet above the ground immediately in front of the plaintiff's premises, the viaduct to extend practically the full width of the street. It may be stated that the construction of the viaduct, as shown by the exhibits in evidence, does make the plaintiff's property almost inaccessible in furtherance of its business, and the plaintiff's leasehold is now between a radius of 27 to 30 feet below the traveled portion of the main highway which the viaduct seeks to serve. Plaintiff alleged that by the construction of the viaduct and condemnation proceedings its business was rendered practically useless for its purpose. This allegation was denied in the answer, and all matters pertaining thereto were also denied.

The tract of land upon which plaintiff built the improvements is located on Federal Highways 73 and 75 and on the Kansas City-Omaha main line of the Missouri Pacific railroad. The railroad tracks run approximately east and west and the highways north and south. The land leased by the plaintiff belongs to the railroad company and is in the southeast quadrant of the intersection of the highway and the railroad tracks. The lease was for a period of 10 years and was dated July 25, 1931. The plaintiff constructed on the tract of land improvements aggregating in cost $14,000. The location of the overpass is such that none of the ground leased by the plaintiff or the improvements thereon was appropriated, but access thereto was impaired to such an extent as to destroy its usefulness for a retail outlet. A small portion of some of plaintiff's buildings is on city property and presumably there without objection. The construction of the viaduct was commenced October 1, 1936. The plaintiff had been in business in Nebraska City for five years prior to the time it obtained this track-side location. This location enabled the plaintiff in its business to effect many economies; that is, it necessi-

tated less handling of its products and provided more efficient and safer loading and unloading of such products and a better market for the reception of poultry and kindred products and the processing thereof both for wholesale and retail trade. The business was likewise located in such a manner as to attract transient or tourist trade over the highways in question, such highways having direct routes north and south through the country. A summary of this evidence discloses that the location in question was an advantageous one for business of the kind and nature carried on by the plaintiff.

The measure of damages and the elements to be considered in arriving at the damages suffered are reflected by the following Nebraska authorities:

In *City of Omaha v. Kramer,* 25 Neb. 489, 41 N. W. 295, this court held: "The words, 'or damaged,' in sec. 21, art. I, of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." And in *Gillespie v. City of South Omaha,* 79 Neb. 441, 112 N. W. 582, this court held: "In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement."

In *Lowell v. Buffalo County,* 119 Neb. 776, 230 N. W. 842, it was held: "Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled, where he suffers damages not common to the public generally." In the opinion, on page 781, the measure of damages was stated thus: " 'Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from

which the injury results.' *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239." On page 782 it was said:

"Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the compensation to which the property owner is entitled, where he suffers damages not common to the public generally. Authority for this view is found in former opinions:

" 'The jury in fixing damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.' *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343."

Plaintiff contends that the court erred in excluding testimony with reference to the lease of the plaintiff, showing the duration of a lease providing for a fixed term of years and "thereafter;" that the duration of the "thereafter" period may be shown, first, by custom with respect to similar leases known to the parties; second, the oral representations by the lessor to the lessee at the inception of the lease, constituting the inducement for the lease; third, reliance upon representations and expenditures in reliance thereon, creating an estoppel; and, fourth, confirmation of such oral representations after the commencement of the lease.

Plaintiff offered to prove by the special assistant to the vice-president of the railroad, who had supervised negotiations for railroad leases for the past 15 years, and who negotiated the lease in question which was signed by him in the name of the vice-president, that the lease was for a term of 10 years and thereafter; that, where a considerable amount of investment is required on the part of the industry, the industry, once located, is considered as permanent, and such leases are seldom canceled and only upon failure to abide by the covenants of the lease or when the

railroad company requires the use of the premises, which is rare; that the lease in question would not have been terminated on May 31, 1941, since the railroad company is dependent upon industries for its revenue; that the fixed terms of railroad industrial leases are in no way representative of the tenure or term of such leases; that it is a general policy of the railroad to make such leases with relatively short, fixed terms, but that they are all let with the idea of permanency. In the light of this evidence, the witness was asked to testify how long beyond May 31, 1941, the term of the lease would have extended. All of such testimony was excluded. The witness further testified that the reason why the lease was not made for 15 or 20 years was because a longer period was not requested.

There was an offer to prove that the improvements placed on the property by the plaintiff were contemplated and discussed in connection with the lease, and a letter, dated April 30, 1931, from the division superintendent to J. Cannon, vice-president and general manager of the railroad, with reference to the improvements, was offered in evidence, wherein a lease for a period of 10 years was requested, with an option to extend the lease an additional 10 years, and stating that the plaintiff company was establishing a permanent business. A letter was offered in evidence, dated March 1, 1937, addressed to the plaintiff, wherein Mr. Cannon stated that the plaintiff's lease would not expire on May 31, 1941, and added: "It is true, however, that either party would have a right under the provisions of the lease to terminate it on or after May 31, 1941, by the serving of thirty days advance notice on the other party." Evidence was also offered to prove the extension of the lease beyond May 31, 1941, as long as the plaintiff continued in business.

The lease is specific, definite and unambiguous and is for a term of 10 years, and, by the express terms thereof, either party may terminate the tenancy on 30 days' notice at any time after the expiration of the fixed term.

The applicability of usage and custom is reflected by the

following authorities: "No rule is better settled than the rule that customs and usages cannot operate to change an express contract. It is only where the contract is ambiguous, unprecise, incomplete, or inconsistent that the search for the intent may be aided by reference to customs and usages." 2 Elliott, Contracts, sec. 1705.

" 'Where a contract is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determine their liabilities.' *Van Hoesen v. Cameron,* 54 Mich. 609, 614." *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.,* 114 Neb. 584, 208 N. W. 742.

Relative to the practical construction to be given to the lease and the intention of the parties at the time the lease was executed, the following principle of law is applicable: "The practical construction put on a contract by the parties cannot control the express unambiguous provisions of the instrument itself, and, further, a practical construction, to be adopted, must be reasonable. * * * The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction." 13 C. J. 548, 549.

The letters in evidence, one written before the making of the lease and the other after the proceedings here had been commenced, are apparently the basis for the construction given to the lease by the parties thereto.

Plaintiff contends that the alleged contemporaneous agreement not to exercise the option to terminate the lease was confirmed by the letter of March 1, 1937, from Mr. Cannon to the plaintiff James, in view of the statement made in the letter: "It is true, however, that either party would have a right under the provisions of the lease to terminate it on or after May 31, 1941, by the serving of thirty days advance notice on the other party."

"When a lease is renewed in accordance with a covenant for renewal the new term is to be treated as part of the original lease so far as the tenant's right to damages by

the taking of part of the property is concerned; but a mere expectation of renewal based on evidence that the landlord and tenant were mutually satisfied and were likely to renew does not create an interest in land, and cannot be considered in determining the value of a leasehold estate." 10 R. C. L. 135, sec. 119.

In the following cases cited by plaintiff: *Hercey v. Board of Chosen Freeholders,* 99 N. J. Eq. 525, 133 Atl. 872; *Iron City Automobile Co. v. City of Pittsburgh,* 253 Pa. St. 478, 98 Atl. 679; *Hoffman Wall Paper Co., Inc., v. City of Hartford,* 114 Conn. 531, 159 Atl. 346; *State v. Northern P. R. Co.,* 88 Mont. 529, 295 Pac. 257, the tenant was granted a fixed term, with the right reserved to the landlord to terminate the lease before the expiration of the term. The fixed term constituted an estate or interest in the real estate. The landlord's option to terminate the tenancy did not operate to divest such interest until exercised. The tenant was the owner for a term of years, subject to a condition subsequent. The aforementioned cases are, therefore, distinguishable from the case at bar.

The cases of *In the Matter of William and Anthony Streets,* 19 Wend. (N. Y.) 678, and *North P. R. Co. v. Davis & Leeds,* 26 Pa. St. 238, cited by plaintiff, involved terms of leases which were, by express covenant, subject to renewal at fixed periods at the lessee's option. In such cases the lessee's right of renewal was considered in determining the value of the unexpired term, and the cases are distinguished from those in which the lessee does not have a legal option to such renewal.

Plaintiff cites *Mayor and City Council of Baltimore v. Rice,* 73 Md. 307, 21 Atl. 181, wherein one Rice was the owner of a brick-yard, constructed on leased premises. It was proposed to enter a street directly through the brick-yard, and Rice testified that if the street should go through the yard would be worth nothing. The agent of the owner testified that it had been his intention to renew the tenancy of Rice, if the street had not been opened, due to the value of Rice's investment and business, and the desire of the

owner to have Rice as a tenant. Plaintiff contends that the testimony of the owner's agent is parallel with that of Mr. Cannon and the representative of the railroad company who negotiated the lease in the instant case. The authority delegated to the superintendent was limited to that delegated to the vice-president and general manager, and did not extend beyond the written provisions of the lease. A railroad lease, extending beyond five years, had to be separately authorized by the president of the railroad. The lease in question was written as authorized, and the written lease expressed the agreement of the parties at the time the lease was made.

The trial court did not err in excluding the evidence offered. The lease was for a fixed period of time, and damage to the leasehold does not extend beyond May 31, 1941.

Plaintiff contends: "Where business property is damaged as the result of a public improvement, future profits, based upon past profits, are a pertinent inquiry in determining the value of the business property damaged,"—citing many cases.

Plaintiff sets out in detail in its brief the case of *City of Omaha v. McGavock*, 47 Neb. 313, 66 N. W. 415, wherein specific testimony was received as to a definite amount in the loss of business, namely, $3,000 a year, and that business had fallen off from a third to a fourth, due to the erection of a viaduct by the city. The writer of the opinion did not fully agree with his colleagues on the admissibility of such evidence. The foregoing case is cited and followed in *Gillespie v. City of South Omaha, supra,* however, not to the extent of permitting the showing of profits (see 79 Neb. 445), and attention is called to the conclusion in the opinion in *City of Omaha v. McGavock, supra,* which is significant, for the reason that the evidence discloses damages in a much larger amount than was returned, and, therefore, such evidence was ample to support the finding of the jury. This conclusion in the opinion indicates that the amount of damages returned was of such amount that to return the case for a retrial, because of evidence showing profits, if erroneous, would not be justified.

"Nor can the profits of a business be shown for the purpose of proving the value of the property. The profits of a business do not tend to prove the value of the property upon which it is conducted. The profits of a business depend upon its extent and character and the manner in which it is conducted. One man will get rich while another will become bankrupt in conducting the same business upon the same property. It is proper, however, to show how the taking will interfere with the use of the property, either for the purpose to which it is actually devoted or for any purpose to which it is adapted." 2 Lewis, Eminent Domain (3d ed.) 1271, sec. 727. See, also, 2 Nichols, Eminent Domain (2d ed.) 1171, sec. 446.

"Accordingly, it is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the continued carrying on of the business in its established location cannot be considered in estimating the damages." 10 R. C. L. 145, sec. 127, and cases cited under note 20.

While the Nebraska cases disclose that every element of annoyance and disturbance resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property may be shown, it does not include, within the meaning of the rule, profits, as contended for by plaintiff.

Plaintiff cites the case of *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Ia. 1082, 198 N. W. 486, 34 A. L. R. 1517. In that case there was no attempt to recover profits. The opinion stated that this item would be too remote and speculative. The courts quite universally so hold.

In the case of *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909, the value of a crop lease was the measure of recovery, and the opinion is so worded that the rule does not extend beyond the facts in the particular case.

In *Stanwood v. City of Omaha*, 38 Neb. 552, 57 N. W. 287, evidence was admitted as to the depreciated amount of rents before and after the construction of a viaduct, and this was given in round figures and involved purely rental

property, where the decrease could be shown with a degree of accuracy.

We adhere to the rule universally followed by the courts that profits in the future, based upon profits as shown by the past, are speculative and conjectural and not admissible as evidence of damage to a leasehold, and that profits, gross and net, do not go to the value of the leasehold under the Nebraska rule in showing diminution of business. We conclude that other citation of authority in this respect is not necessary.

Plaintiff contends that the court erred in denying it the right to show the volume of business conducted on the leased premises. It endeavored to prove the volume of business by showing the number of gallons of gasoline, oils and kindred products handled, and offered like proof with reference to the poultry, egg, cream and milk business carried on by plaintiff. The court permitted testimony as to the economies and saving, but restricted testimony as to the volume of business.

While stated figures in a business, such as plaintiff's, with fluctuating prices from time to time, would not be a proper basis of damage, certainly the amount of business by volume, that is, the amount of produce, oils, poultry, eggs, etc., handled and the amount thereof handled since the construction of the viaduct would be competent.

The value of a leasehold must be determined by consideration of the uses to which the property is adapted. All circumstances naturally affecting this value are open to consideration. Every legitimate use to which it may be applied may be considered. The market value of the unexpired term should be taken into consideration, also the situation, condition and use made, or that may be made, of the premises, and the nature and prosperity of the business carried on there, if it affects the value of the lease. *Bales v. Wichita M. V. R. Co.*, 92 Kan. 771, 141 Pac. 1009, L. R. A. 1916C, 1090. As to the extent of proof of elements, not as independent items of damage, but as it affects the market value, see *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327.

The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume. See *Gillespie v. City of South Omaha, supra; City of Omaha v. Flood,* 57 Neb. 124, 77 N. W. 379; *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521; *Des Moines Wet Wash Laundry v. City of Des Moines, supra.* And in *Lowe v. City of Omaha,* 33 Neb. 587, 50 N. W. 760, it was held: "The market value is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available."

We believe that the court erred in excluding testimony as to volume of business and restricting proof thereof.

Plaintiff further contends that the court erred in excluding testimony of expert witnesses who were acquainted with the nature, kind and volume of business transacted by the plaintiff. The admissibility of evidence of experts is left largely to the sound discretion of the trial court, and it will not, ordinarily, be disturbed unless it is found that the court abused its discretion. 22 C. J. 526. However, it would not be necessary that a witness be acquainted with real estate values of the city in order to qualify as an expert. The value of the leasehold is the question at issue in this case. The leasehold stood upon a tract of ground on the Missouri Pacific right of way, with a nominal rental. The location had a distinct advantage, due to the nature of the business. Many track-side industries are placed along a railroad's right of way under similar and like leases, and businesses of a like or similar nature to that of plaintiff are also on leased right of ways. Witnesses, acquainted with the nature of the business, volume of business done, advantages of track-side facilities for the business, and who have a knowledge of the business by volume transacted by the plaintiff, would be competent to testify, and should not be restricted in their testimony on such facts, subject to proper qualifications to so testify and proper foundation

laid for such testimony. See *Cochrane v. Commonwealth*, 175 Mass. 299, 56 N. E. 610; *Consolidated Gas Co. v. Baltimore City*, 105 Md. 43, 65 Atl. 628; *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 249 Fed. 385.

The trial court erred in restricting this testimony; such testimony goes to the diminution of the value of the leasehold for the unexpired term of the lease.

Plaintiff objects to certain instructions given by the trial court which we deem not necessary to be discussed here, for the reason that, on a retrial of this case, under the principles of law as announced in this opinion, certain instructions will be subject to modification or change, and others will be given as the proof develops.

For the reasons given herein, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLEE, V. CARRIE P. PERSON ET AL., APPELLANTS.
284 N. W. 260

FILED FEBRUARY 17, 1939. No. 30490.

1. **Subrogation.** " 'The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.' *South Omaha Nat. Bank v. Wright*, 45 Neb. 23, and *Rice v. Winters*, 45 Neb. 517, followed." *Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55.
2. ———. Where defendant, competent to make valid liens, purchases real estate, assumes mortgage thereon and, in addition, executes and delivers to seller a second mortgage as part payment of the purchase price, and by a succession of mortgages, the original indebtedness is refunded; plaintiff's assignor, relying on defendant's application for a loan, containing an agree-

ment that the loan would be secured by a first mortgage on the real estate, and relying on abstract of title, and without knowledge of defendant's incompetency, and believing its lien will be a first lien on the real estate, lends and pays out the money as directed by defendant, and the then-existing liens are released of record; plaintiff as assignee, for valuable consideration, relying on the assignment, and on mortgagor's certificate of estoppel, and without knowledge of defendant's incompetency, and, believing it has a first lien, by extension agreement, extends the mortgage; defendant defaults in interest payments; plaintiff sues to foreclose its mortgage; defendant's guardian answers, alleging incompetency of defendant at the time of execution and delivery of such mortgage to plaintiff's assignor; *held*, plaintiff is entitled to be subrogated to the rights of the original mortgagees and to have release of such mortgages vacated and set aside, and the liens evidenced thereby revived and reestablished as valid liens on said real estate for plaintiff's benefit in such amount, and that said mortgage liens be foreclosed and real estate sold in satisfaction thereof.

3. Appeal. "In the absence of a bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if the latter can by any fair interpretation be held to support it." *Swobe v. Drummond Motor Co.*, 109 Neb. 631, 192 N. W. 320.

APPEAL from the district court for Wayne county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

James E. Brittain and *H. E. Siman*, for appellants.

Winfield R. Ross, Brown, Fitch & West and *Fred S. Berry, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff brought this action to foreclose a 7,500-dollar mortgage executed by Carrie P. Person, owner, and Per Person, her husband, on 160 acres of land in Wayne county, Nebraska. The judgment of the trial court awarded to plaintiff a first lien upon the real estate for the sum of $7,500, and ordered the land sold for the satisfaction of said lien, the defendants having failed to redeem within a

period of 20 days. From this decree and judgment of the court defendants appeal.

Plaintiff's second amended petition contained the usual allegations of a cause of action for foreclosure of a real estate mortgage, and alleged, in substance, that prior to the execution and delivery of the mortgage by defendants the land had been encumbered by two mortgages totaling $7,500, both of which were valid liens and made while defendant Carrie P. Person was mentally competent. Carrie P. Person bought 160 acres of land from Oliver Chapman, her uncle, on January 24, 1910, and received a warranty deed therefor. At the time, there was a mortgage on the land in the amount of $3,000, dated March 22, 1905, that had been executed by Chapman and wife, running to M. D. Cameron, due April 1, 1910. As part of the purchase price Carrie P. Person and her husband executed and delivered a note and mortgage to Chapman January 25, 1910, due April 1, 1915, in the amount of $4,500, subject to the 3,000-dollar mortgage, which was extended to April 1, 1915. March 19, 1915, the two mortgages remained unpaid, and, in order to refund the indebtedness, defendants made, executed and delivered to the Prudential Insurance Company of America a note and mortgage in the sum of $4,500, due April 1, 1920, and at the same time gave to Oliver Chapman a note and mortgage in the amount of $7,017.25, also due April 1, 1920. The proceeds from the loan obtained from the Prudential Insurance Company were paid to M. D. Cameron, and the balance over and above the amount of his mortgage was applied to reduce the Chapman mortgage. The Cameron mortgage was released of record April 20, 1915. On April 1, 1920, the entire indebtedness secured by the mortgage deeds, as aforesaid, was unpaid. The defendants then borrowed from Walter L. Hurlbert the sum of $4,500, giving a note and mortgage therefor, due April 1, 1925, and, to evidence the refunding of the indebtedness remaining due to Oliver Chapman, gave him a note and mortgage in the sum of $7,000, dated April 1, 1920. The money obtained from Hurlbert was paid to the Prudential

Insurance Company in settlement of its loan, and its mortgage was released April 15, 1920. On January 22, 1925, the entire indebtedness secured by the mortgage deeds, that is, of Hurlbert and Chapman, was unpaid, and, in order to refund part of said indebtedness, the defendants applied to the Forgan Investment Company for a loan in the amount of $13,000. The sum of $7,500 was loaned by the Forgan Investment Company to the defendants, and on February 20, 1925, defendants made, executed and delivered to the investment company a note and mortgage, due April 1, 1930. The Forgan Investment Company paid Hurlbert $5,212.45 in full for his lien, and applied to the Chapman indebtedness the sum of $2,310. The Hurlbert mortgage was released March 6, 1925, and the Chapman mortgage on March 30, 1925. February 20, 1925, the defendants, in order to induce the plaintiff in this action to purchase said mortgage and accept assignment thereof, made, executed and delivered to plaintiff a certain mortgagor's estoppel certificate. March 25, 1925, the Forgan Investment Company, for full value, assigned its note and mortgage to the plaintiff. On December 5, 1929, defendants, desiring an extension of the mortgage to April 1, 1935, made, executed and delivered to the plaintiff an extension agreement. Defendants failed and neglected to pay the interest coupons April 1, 1933, and April 1, 1934; hence this action to foreclose the mortgage in suit.

Plaintiff further alleged that the Forgan Investment Company made the loan to defendant Carrie P. Person upon the express agreement and covenants of defendants that plaintiff's mortgage would be a first lien on the real estate, and that the proceeds from the loan to defendants were paid out by said company as per their direction; and further alleged that, in the alternative, if the lien of plaintiff's mortgage deed on the real estate is not a valid first lien, the plaintiff is entitled to have the lien of the two mortgages to M. D. Cameron and Oliver Chapman revived and the respective releases thereof canceled and set aside, and that plaintiff is entitled to be subrogated to the rights

of Cameron and Chapman under their separate mortgages, and to be treated as the equitable assignee thereof, and to have the same reestablished on said real estate for the amount paid by the Forgan Investment Company to satisfy and discharge the Hurlbert and Chapman mortgages.

The answers of Per Person and Per Person as guardian of Carrie P. Person alleged that Carrie P. Person was insane and incompetent at the time of the execution of the mortgage in suit and at the time of the execution of the extension agreement and estoppel certificate, and was incapable of understanding the nature thereof; that she had been adjudged to be insane by the proper authorities of Wayne county in December, 1920, was confined in the State Hospital for the Insane at Norfolk, and had been insane for several years prior thereto; alleged an adjudication of the mortgage of Oliver Chapman by the district court for Wayne county in a previous action. The answer of Per Person admitted the corporate capacity of plaintiff; that he was appointed guardian August 15, 1933; that Carrie P. Person owned the fee simple title to the real estate involved, and the proceedings relating to the assumption of the 3,000-dollar mortgage of Cameron, the purchase of the real estate from Chapman and the giving of the 4,500-dollar mortgage to Chapman; and denied the other allegations of the plaintiff's second amended petition.

Plaintiff's reply contained an allegation of the ownership of the premises in Carrie P. Person and that the funds received from the 7,500-dollar mortgage were disbursed under her direction; that she is barred and estopped from alleging insanity and asserting that plaintiff's mortgage indebtedness is not a valid lien upon the real estate; denied that the Forgan Investment Company had any knowledge or notice of the alleged incompetency; denied generally the allegations of the answer.

The court found that the several mortgages referred to in the petition were executed as alleged and that, in order to refund the indebtedness on the several occasions, as heretofore mentioned in the petition, the several mortgages

were given; found that the original indebtedness of $7,500 on the land at the time Carrie P. Person was sane had never been reduced but had continued by virtue of other loans from the time of the purchase of the real estate and the mortgage evidencing former indebtedness released; that the Forgan Investment Company had no knowledge of the insanity of Carrie P. Person; found the amount due on the mortgage to be $11,313.26 as of date of March 10, 1938; gave the plaintiff a first lien on the real estate in the amount of $7,500, and upon failure of defendants to pay the lien within 20 days from the date of decree the realty to be ordered sold; the proceeds received therefrom to be first applied to the payment of plaintiff's lien, and second for the use and benefit of the defendants; and granted a decree in foreclosure. The court found for the plaintiff on what it terms straightforward equitable principles that should be invoked in this case, and did not apply the doctrine of subrogation.

The appellants start with the premise that the prayer for alternative relief contained in plaintiff's second amended petition is that its mortgage be established as a first and valid lien against the real estate, and that, if the mortgage is not valid, then the release of the Cameron and Chapman mortgages be vacated and plaintiff be subrogated to such mortgage liens; that the plaintiff is therefore relying on subrogation in case the mortgage in suit is found void. Defendants state that they are in accord with plaintiff in this respect, and call attention to paragraph 15 of the court's decree, which in part reads: "In case a debt as a matter of equity is entitled to be subrogated to the lien of a mortgage upon real estate, it is within the power of a court of equity, as a condition precedent to granting equitable relief to the owner of the real estate, to compel the payment of that mortgage, even though by its terms said lien be barred by the statute of limitations;" and state that if recovery is had it must be through subrogation.

The loan secured by plaintiff's mortgage was made in good faith; neither plaintiff nor its assignor had any knowl-

edge of the alleged incompetency of Carrie P. Person. There was no fraud or over-reaching, and the proceeds of the loan were disbursed in payment of her mortgage indebtedness as directed. As to insanity, appellants claim that the incompetency of Carrie P. Person was the only fact to be determined, and it was determined that she was insane.

With reference to the mental competency of Carrie P. Person, the court found that in 1920 and at the time of the original mortgage to the Forgan Investment Company in 1925, and at the time of the extension agreement in December, 1929, and at the present time, Carrie P. Person was suffering from *dementia præcox*; that in 1920 she had been incarcerated in the state hospital for four months, was paroled two or three years later and discharged; that it is not possible to know with certainty the extent to which this disease affected her judgment in the matter, or whether she knew the nature or extent of her transactions at any of those times; that she probably knew what she was doing when she signed the plaintiff's deed and extension agreement, but did not know or care about the amounts.

Appellants assign as error the rendering of the decree and decreeing any lien against the real estate in question, after having found Carrie P. Person incompetent, and that the findings of fact made by the trial court furnish neither reason nor basis for the decree, but show that the plaintiff is not, either in law or in equity, entitled to a decree.

Subrogation is a salutary, equitable remedy, conceived in justice, and the decisions in this state have given full recognition to the doctrine, as evidenced by the following authorities:

In *Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55, this court held: " 'The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid

down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.' *South Omaha Nat. Bank v. Wright,* 45 Neb. 23, and *Rice v. Winters,* 45 Neb. 517, followed."

"Originally, the right of subrogation was limited to transactions between principals and sureties, but courts of equity have expanded the doctrine so that now it will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. The doctrine will be applied in all cases where demanded by the dictates of equity, good conscience and public policy." *State v. Citizens State Bank,* 118 Neb. 337, 224 N. W. 868. See *Eaton v. Hasty,* 6 Neb. 419; *Frederick v. Gehling,* 92 Neb. 204, 137 N. W. 998; 25 R. C. L. 1313, sec. 2; 1314, sec. 4; 1322, sec. 10.

Law writers have generally classified subrogation into two classes: Legal subrogation, which is allowed in cases where one, who pays the debt of another, stands in the situation of a surety and is compelled to pay the debt to protect his own rights; and conventional subrogation which arises when one pays the debt of another under an agreement, existing at the time of the payment with the debtor or creditor, that the person paying it shall be subrogated to the rights of the creditor. *Luikart v. Buck,* 131 Neb. 866, 270 N. W. 495; 2 Story, Equity Jurisprudence (14th ed.) 110, sec. 706.

Appellants' contention is that plaintiff does not attempt to bring itself within the scope of legal or conventional subrogation; that plaintiff did not make this loan, or pay the Hurlbert mortgage and a part of the Chapman mortgage to protect itself; that it was not a surety for either; that it was a mere volunteer and was dealing at arm's length with Carrie P. Person; that no claim had been made and there is no evidence of an agreement with Carrie P. Person, Chapman or Hurlbert, that the mortgage liens of Hurlbert and Chapman should be kept alive and plain-

tiff subrogated thereto; that plaintiff is a volunteer and a stranger.

This court in *Bohn Sash & Door Co. v. Case,* 42 Neb. 281, 293, 60 N. W. 576, sets forth the definition of a volunteer or stranger as stated in *Emmert v. Thompson,* 49 Minn. 386, 52 N. W. 31: "The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or encumbrances on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted, in fact, in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or encumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor."

Appellants cite *Rice v. Winters,* 45 Neb. 517, 63 N. W. 830, wherein this court held: "A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Aetna Life Ins. Co. v. Middleport,* 124 U. S. 534, followed." See, also, *Meeker v. Larsen,* 65 Neb. 158, 90 N. W. 958; *Mavity v. Stover,* 68 Neb. 602, 94 N. W. 834; *Boevink v. Christiaanse,* 69 Neb. 256, 95 N. W. 652; *Sharp v. Citizens Bank of Stanton,* 70 Neb. 758, 98 N. W. 50.

In the instant case, the original indebtedness, in the amount of $7,500, has never been paid, but by a succession of mortgages the indebtedness has been refunded. At the time of the creation of the original indebtedness, as far as Carrie P. Person is concerned, she was sane and capable of contracting. The Forgan Investment Company relied

upon a written application for a loan of $13,000, containing an agreement that the loan would be secured by a first mortgage on real estate, and relied on an abstract of title, furnished by appellants; it had no knowledge of the alleged insanity. The plaintiff, as the assignee of the Forgan Investment Company, relied upon a certificate of estoppel and upon an abstract of title, and subsequently upon an extension agreement, and, by virtue of its assignment, stood in the same relation as the Forgan Investment Company. By purchasing the mortgage from the investment company, it purchased the debt. The proceeds had been applied by the Forgan company as directed, not by it but by defendants. By the very nature of the transaction, there is at least an implied agreement that this plaintiff would have a first lien on the premises, and in view of the facts, where the original indebtedness has not been extinguished and has been in existence and still is and evidenced now by plaintiff's mortgage.

In *Hoagland & Co. v. Decker,* 118 Neb. 194, 224 N. W. 14, referring to subrogation, it was said in the opinion: "The word 'conventional' is defined as growing out of or established by convention; that is, an agreement or mutual engagement between persons. As the name implies, conventional subrogation is founded upon some understanding or agreement, express or implied, and without which there is no 'convention.' "

"Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor." *State v. Holdrege State Bank,* 110 Neb. 814, 195 N. W. 120.

The following authorities also show the extent to which our court has gone in granting subrogation:

"A court of equity will apply the doctrine of subrogation where to refrain from so doing would permit a person who has received the benefit of money paid under a mistake of fact, which discharged a lien upon real estate, to retain such benefit under such circumstances that equity and good conscience dictate its repayment or the preservation of the

lien." *Lee v. Newell,* 96 Neb. 209, 147 N. W. 684. See, also, *Criswell v. McKnight,* 120 Neb. 317, 232 N. W. 586.

In *Hoagland & Co. v. Decker, supra,* it was held: "No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration."

Appellee cites the case of *Betts v. Sims,* 35 Neb. 840, 53 N. W. 1005, as being a precedent for granting subrogation in the instant case. The case cited was an action brought by Betts and wife against Sims to quiet title. Sims and his grantors had paid off prior mortgages, all believing they had a good title to the land. Sims asked for a revival of the mortgage liens and the right of subrogation to the rights of their holders and to have the liens enforced against Betts. The court held: "A purchaser of real estate who has paid off a prior mortgage thereon in the belief that he was the owner of the property purchased, will, on a failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt."

In the instant case, the Cameron 3,000-dollar mortgage and the Chapman mortgage were valid liens which were not paid by Carrie P. Person. The plaintiff and its predecessors paid these mortgages in the belief that they had obtained valid first mortgage liens. In *Betts v. Sims, supra,* the prior valid mortgage liens were revived for Sims' protection, and he was treated as the assignee of the same and subrogated to the rights of the mortgagees.

In the decree of the district court, in paragraph 15, the court found that a judgment in favor of Mrs. Person would, in effect, be a decree quieting her title, and that the statute of limitations does not run as against subrogation; that the guardian's answer for the incompetent ward, in fact, asked that her title to the real estate be quieted against plaintiff.

In the instant case, there is no bill of exceptions, and, in the absence thereof, it is presumed that all issues of fact raised by the pleadings received support from the evidence, and that such issues were correctly determined.

"In the absence of a bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if the latter can by any fair interpretation be held to support it." *Swobe v. Drummond Motor Co.*, 109 Neb. 631, 192 N. W. 320. See *Kupke v. Polk*, 73 Neb. 590, 103 N. W. 321.

The special findings in the instant case, by fair interpretation, are held to support the judgment of the trial court. To hold for the defendants would deprive the plaintiff of the full amount of $7,500 and permit Carrie P. Person to retain 160 acres of land, without indebtedness thereon.

In equity and good conscience, we believe that a decree should be entered, providing that the release of the mortgage to M. D. Cameron, dated March 22, 1905, and the release of the mortgage to Oliver Chapman, dated January 25, 1910, on said real estate be vacated and set aside, and that the liens of said respective mortgages be revived and reestablished as valid liens on said real estate for the plaintiff's benefit, and that the plaintiff be decreed to be subrogated to the mortgage liens of said M. D. Cameron and Oliver Chapman, and the mortgage liens foreclosed, and said real estate sold in satisfaction thereof, in the amount of said mortgage liens, namely, $7,500.

AFFIRMED.

EDGAR DUTIEL V. STATE OF NEBRASKA.

284 N. W. 321

FILED FEBRUARY 24, 1939. No. 30383.

1. **Criminal Law.** "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import

of the written law." *Lane v. State*, 120 Neb. 302, 232 N. W. 96.

2. **Indictment and Information.** To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.
3. **Constitutional Law.** Before this court can rule on the question as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed and dismissed.*

O. M. Olsen and *John M. Berger*, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Edwin Vail, contra.*

Swarr, May & Royce, amici curiæ.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

On January 19, 1938, a complaint was filed against the plaintiff in error, hereinafter referred to as the defendant, in the municipal court of Omaha, Douglas county, Nebraska, in which it was charged that "Edgar Dutiel on or about the 15 day of January, A. D. 1938, in the county aforesaid and within the corporate limits of the City of Omaha aforesaid, then and there being did violate Section 28-813, Compiled Statutes of Nebraska, for 1929 in that he did unlawfully loiter about, patrol, beset and picket, by means of carrying banners upon his person, and walking to and fro on the sidewalk in front of the place of business of Phillip Greenberg, located at 4935 South 24th Street, Omaha, Nebraska, where said Phillip Greenberg was engaged in a lawful business, for the purpose of inducing and influencing and attempting to influence and induce others not to trade with, buy from and have business dealings with said Phillip Greenberg, so that thereby the said lawful business

of the said Phillip Greenberg was obstructed and interfered with, contrary to the Statutes of the State of Nebraska, in such cases made and provided and against the peace and dignity of the State of Nebraska."

In the municipal court the defendant failed to plead; a plea of not guilty was entered by the court; and the defendant was tried, convicted, and sentenced to pay a fine of $10 and costs of prosecution.

An appeal was taken to the district court for Douglas county. The original complaint was refiled in that court. The defendant filed a motion to quash the complaint, and, among others, assigned the following reason therefor: "Because all of the acts alleged to have been committed by the defendant, and all of the things done by the defendant do not constitute a violation of any statute or rule of law." The motion was overruled by the trial court.

The defendant then filed a demurrer to the complaint, "for the reason that the facts stated in said complaint and information do not constitute an offense or crime punishable by the laws of the state of Nebraska," and assigned eight additional reasons therefor, the sixth of which is as follows: "Because all of the acts alleged to have been committed by the defendant, and all of the things done by the defendant do not constitute a violation of any statute or rule of law." The demurrer was overruled by the trial court.

The defendant was then arraigned. He refused to plead, and the court entered a plea of not guilty. A trial by jury was waived. The case was submitted to the court on "a stipulation of the facts in controversy in this case." No other evidence was offered.

The defendant was found guilty, fined $10, and ordered to pay the costs of prosecution. Thereupon the defendant filed a motion for a new trial for the following reasons among others:

"The court erred in overruling defendant's motion to quash the complaint and information filed herein.

"The court erred in overruling defendant's demurrer filed herein."

The motion for a new trial was overruled. The defendant, appealing to this court, in his petition in error alleges twelve errors of the trial court. We shall consider five of them, which are as follows:

"In that the verdict and judgment of the court are contrary to law."

"In that the verdict and judgment of the court are contrary to the Constitution of the State of Nebraska."

"In that the verdict and judgment of the court are contrary to the Constitution of the United States of America."

"In that the court erred in overruling defendant's motion to quash the complaint and information."

"In that the court erred in overruling defendant's demurrer to the complaint and information."

In his brief filed herein, the defendant sets out as errors relied upon for reversal substantially the same reasons assigned in his petition in error.

The complaint is based upon an alleged violation of section 28-813, Comp. St. 1929. In that act the legislature provided: "It shall be unlawful for any person or persons, singly or conspiring together,"

To do certain acts, which are: "To loiter about, beset, patrol, or picket in any manner the place of business or occupation of any person, firm, or corporation engaged in any lawful business or occupation, or any street, alley, road, highway or other place, in the vicinity where such person, firm or corporation may be lawfully engaged, in his, their or its work, business or occupation;"

With certain purposes, which are: "For the purpose of inducing or influencing, or attempting to induce or influence, others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation;"

With certain results, which are: "So that thereby (1) the lawful business or occupation of such person, firm or corporation will be obstructed, interfered with, injured, or damaged, *and* (2) such person, firm or corporation *thereby* be induced or coerced against his, their or its will, intimi-

dated, or threatened, (a) to do something, he, they or it may legally refrain from doing, *or* (b) to refrain from doing something, he, they or it may lawfully do." (The numbers and letters in parentheses and the italics are ours.)

The following rules of construction are applied to this statute.

"In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *State v. Swanson,* 127 Neb. 715, 256 N. W. 872, and cases there cited.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. * * *

"So, too, in construing or interpreting provisions of criminal law it is to be remembered that if any doubts of the meaning exist in penal laws they ought to be construed in favor of the accused." *Lane v. State,* 120 Neb. 302, 232 N. W. 96.

"It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication." *Preston v. State,* 106 Neb. 848, 184 N. W. 925.

The doing of the acts, for the purposes, with the results set out in the statute are the elements of the offense.

Does the complaint herein contain a distinct allegation of each essential element of the crime as defined by the statute?

Without passing upon the sufficiency of the allegations of the complaint otherwise, it is evident that the complaint herein does not charge, nor attempt to charge, the occurrence of that element of the result of the alleged illegal acts which is set out in the following provision of the statute, which requires that such person, firm, or corporation shall "*thereby* be induced or coerced against his, their or its will, intimidated, or threatened, (a) to do something, he, they or it may legally refrain from doing, *or* (b) to

refrain from doing something, he, they or it may lawfully do." (Italics and letters in parentheses are ours.)

The above result is an essential element of the offense created by the legislature. Without the allegation in the complaint of the occurrence of that element, the offense created by the statute was not charged.

Section 11, art. I of the Constitution of Nebraska, provides: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation."

To charge a statutory offense, the information or complaint *must* contain a distinct allegation *of each essential* element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. See *Smith v. State,* 21 Neb. 552, 32 N. W. 594; *Barton v. State,* 111 Neb. 673, 197 N. W. 423; *Herbes v. State,* 79 Neb. 832, 113 N. W. 530; *Knothe v. State,* 115 Neb. 119, 211 N. W. 619; *In re Application of Flanders,* 119 Neb. 761, 230 N. W. 684.

These decisions are based upon the constitutional provision above quoted.

"The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state." Comp. St. 1929, sec. 29-1809.

"A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Comp. St. 1929, sec. 29-1807.

As to informations, the statute provides: "The offenses charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases." Comp. St. 1929, sec. 29-1603.

"The provisions of the criminal code in relation to indictments * * * applying * * * to motions, pleadings, trials and punishments * * * shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings thereon." Comp. St. 1929, sec. 29-1604.

Section 29-1501, Comp. St. 1929 provides: "No indict-

ment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected * * * for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

In *Anthony v. State,* 109 Neb. 608, 192 N. W. 206, this court stated: "This statute was not intended to deprive accused of a substantial right, to his prejudice. Under our system of criminal law it is a substantial right of accused to have all elements of the offense for which he is prosecuted stated in the indictment or information."

Section 29-2308, Comp. St. 1929, provides: "No judgment shall be set aside * * * in any criminal case * * * for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

This court in *Stowe v. State,* 117 Neb. 440, 220 N. W. 826, stated that, under this section of the statute, "The court will not ignore 'error as to any matter of pleading or procedure' in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the 'nature and cause of accusation' against him."

This court also referred to that section of the statute in *Barton v. State,* 111 Neb. 673, 197 N. W. 423, and stated: "That section does not obviate the necessity of alleging in the information every material element of the alleged offense, and thus advise the accused of the charges which he may have to meet. This was a substantial right to which the accused was entitled. The sufficiency of the information was raised in due time in the district court by a motion to quash, and by demurrer. The demurrer should have been sustained."

The defect in this complaint is not one of technical procedure. A substantial right of the defendant is involved. This court cannot shut its eyes to the obvious failure of the

complaint to charge the commission of an offense as defined by the statute. The Constitution guarantees the right of an accused person to be so charged. The statutes of this state provide the method for its enforcement. The defendant has followed the prescribed method. This court has repeatedly protected an accused person under like circumstances. The demurrer should have been sustained by the trial court.

Both the Constitution of the United States and the Constitution of the state of Nebraska provide that no person shall be deprived of life, liberty, or property without due process of law. "Due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, *accusation in due form*, notice and opportunity to answer the charge, trial according to the settled course of judicial proceeding, and a right to be discharged unless found guilty." 12 C. J. 1202. Due process of law has been denied the defendant in this case.

Both in the printed briefs filed herein and the oral argument before this court, the parties have presented the question of the constitutionality of section 28-813, Comp. St. 1929. Before this court can rule on the question as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid. Here the court is not presented with such a record.

The judgment appealed from is reversed and the cause dismissed.

REVERSED AND DISMISSED.

HERMAN EISENHAUER, APPELLANT, V. OTOE COUNTY, APPELLEE.

284 N. W. 332

FILED FEBRUARY 24, 1939. No. 30529.

1. **Workmen's Compensation: APPEAL.** When one party accepts an award in his favor by a single judge of the compensation

court, he cannot prevent the defeated party from electing to waive a hearing before the Nebraska workmen's compensation court sitting en banc, and appeal directly to the district court.

2. ———. The burden of proof is upon an employee who claims to have suffered an accident in the freezing of his hands while driving a Caterpillar tractor in a blizzard to clear roads of snow, and the evidence having failed to prove such accident, the case is dismissed.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Affirmed.*

Thomas E. Dunbar, for appellant.

Edwin Moran and *Vantine A. James, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an appeal from an order of the district court vacating and setting aside an award for compensation made by Judge Jackman of the Nebraska workmen's compensation court.

The evidence discloses that Herman Eisenhauer had been employed since April, 1925, as a road patrolman by Otoe county. His work was in the southern part of the county, in and around the town of Burr, Nebraska. His duties were to drag and blade the roads. He had to work on these roads in all kinds of weather. In the summer time it was hot, and he had to keep the gravel roads of the county in condition, and in the winter time one of his jobs was to remove the snow from the highways.

On January 25, 1936, he was directed by telephone by Ed Wallen, county commissioner, to go and clear the roads of snow on a day when there was a severe blizzard on and all the roads were blocked. About the only person daring to venture out on this county road that day, according to the evidence, was one rural mail carrier, for there was a high wind, and it was 15 degrees below zero.

The equipment which Eisenhauer was using on the day of the alleged accident was a large Caterpillar tractor,

drawing a plow with which the snow was removed from the road. This equipment had no cab, or any kind of protection from the weather, and both of the men were entirely exposed to the elements, being high from the ground. They went from Burr east, and in coming back west they faced the wind, and the evidence disclosed that when Eisenhauer got home his hands were in a serious condition. They were blue and contracted, and he said he could hardly hold the levers, and he put his hands in snow, and then snow water, and suffered great pain that night from his hands.

On May 10, 1937, the said Judge Jackman held a hearing at Nebraska City, taking evidence in said case, and on December 1, 1937, entered an award, finding that Herman Eisenhauer suffered an accident on January 25, 1936, while plowing snow on a county road east of Burr, in that "plaintiff froze his hands, right cheek and nose; that as a result of said accidental injuries, plaintiff developed a latent disability on or about the 23d day of June, 1936, known as enlargement of phalanges, contracture of hand tissues, tendon spaces and sheaths to a terminal inability to flex the phalanges or palm of hands; that said latent disability was caused and is attributable to said accidental injuries which occurred to the plaintiff on the 25th day of January, 1936; that the nature and extent of said latent disability were such as to entitle plaintiff to compensation, hospital, medical and surgical care under the provisions of the Nebraska workmen's compensation law."

On December 11, 1937, the defendant, the county of Otoe, filed in the district court a certificate of waiver and election, to the effect that the county had elected to appeal directly to the district court for Otoe county from the award of Judge Charles E. Jackman, one of the judges of the Nebraska workmen's compensation court, which certificate was signed at Lincoln, Nebraska, December 11, 1937, by the Nebraska workmen's compensation court, Frank M. Coffey, presiding judge, and on the same day, December 11, 1937, the county of Otoe filed its petition on appeal in the district court for Otoe county, setting out the allegations of

the plaintiff as to the accident and damages, a brief summary of the answer filed by the county, a recitation of the hearing before Charles E. Jackman, one of the judges of the compensation court, then setting out ten grounds on which the award was erroneous and contrary to the evidence and the law, and praying that the award be set aside and the plaintiff's petition dismissed, and attaching thereto exhibit A, a copy of the petition filed by Herman Eisenhauer in the compensation court, exhibit B, a copy of the answer filed by the county of Otoe, and exhibit C, a full and complete copy of the award.

On December 16, 1937, Herman Eisenhauer filed his special appearance, objecting to the jurisdiction of the district court for Otoe county on the ground that, under the laws of the state of Nebraska, the Nebraska workmen's compensation court has exclusive jurisdiction of said cause, and that the purported appeal of the county deprived the plaintiff of a hearing before the Nebraska workmen's compensation court. It is further alleged in said special appearance that, although the plaintiff had elected to abide by the award of Judge Jackman, one of the judges of said court, and had requested no rehearing, the purported waiver and appeal by Otoe county to the district court attempts to deny the plaintiff a full and complete hearing before the Nebraska workmen's compensation court, which violates the express terms of the Nebraska workmen's compensation act and the amendments thereto, for the reason that the only appeal to the district court in compensation cases is from an award or judgment entered by the Nebraska workmen's compensation court upon a rehearing from the award of a single judge thereon. On February 28, 1938, the said special appearance of the plaintiff was overruled, and he was given ten days to plead.

Section 48-174, Comp. St. Supp. 1937, was enacted by chapter 57, Laws 1935, to create a Nebraska workmen's compensation court of three judges, and in section 13 thereof it provides that, when the answer is filed, one of the judges of said court shall hear the cause and make findings,

awards, or judgment, the same to be signed only by the judge before whom such proceedings were had, which findings are conclusive upon all parties until reversed or modified upon appeal. It further provides in subdivision 5 of section 13 that either party may, within 14 days from the award of the judge, file an application for rehearing, which rehearing shall be held in Lancaster county, or in another county, at the discretion of the court, but that the employer or the injured employee may waive rehearing before the compensation court and appeal directly to the district court of the county in which the accident occurred. It is further provided that, upon written stipulation of the parties, the matter may be submitted to the district court to be tried as a case in equity, and that appeals to the district court shall be perfected in the same manner as provided for appeals to the compensation court, which is by an application for a rehearing.

It appears that in some of the late cases brought to this court the appeal was first to the compensation court sitting en banc, as in *Johansen v. Farmers Mutual Hail Ins. Ass'n*, 133 Neb. 118, 274 N. W. 393, and in *Svoboda v. Mandler*, 133 Neb. 433, 275 N. W. 599, a hearing was first had before the deputy labor commissioner at Omaha, and then before Judge Welch, and then an appeal was taken to the three members of the compensation court.

In other cases, such as *Skochdopole v. State*, 133 Neb. 440, 275 N. W. 665, *Pillard v. Lincoln Packing Co.*, 133 Neb. 898, 277 N. W. 587, *Sheets v. Glenwood Telephone Co.*, *ante*, p. 56, 280 N. W. 238, *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254, *Ludwickson v. Central States Electric Co.*, *ante*, p. 371, 281 N. W. 603, *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802, and *Westcoatt v. Lilley*, 134 Neb. 376, 278 N. W. 854, the transcripts show that the appeal was direct to the district court from a hearing before one judge, upon a waiver of a rehearing before the full compensation court.

In *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576, the employee filed in

writing his refusal to accept the award, and applied for a rehearing before the full compensation court, which application was granted. A few days later the city of Lincoln filed a waiver of rehearing and notice of appeal, as set out in said opinion, and thereafter an action in the nature of prohibition was instituted by the city of Lincoln as an original action in the district court for Lancaster county, and it was held that such employee was entitled to have his cause determined finally at his election by the Nebraska compensation court.

However, in the case at bar, the employee, Eisenhauer, is satisfied with the award made by Judge Jackman, and elects to accept said award. The county of Otoe desires to appeal from said award, and files a certificate and waiver of a hearing before the full compensation court, and appeals directly to the district court, which the county has a right to do, and the order of the district judge, overruling the special appearance, was proper, and not in conflict with our opinion in *City of Lincoln v. Nebraska Workmen's Compensation Court,* 133 Neb. 225, 274 N. W. 576. When one party accepts an award in his favor by a single judge of the compensation court, he cannot prevent the defeated party from electing to waive a hearing before the Nebraska compensation court sitting en banc, and appeal directly to the district court.

We will now proceed to examine the evidence in the case, as the plaintiff relies for reversal on the assignment of error that the judgment of the trial court is not sustained by the evidence. The county of Otoe admits that Eisenhauer was working on a very cold day, but absolutely denies that he ever had his hands frozen; admits that he testified that his cheek and nose were frozen. It is not disputed that the employee worked the next day as usual on the tractor, but he said that he wore heavier mittens, and that his hands were cold all the time. He continued to work at the same work for at least another month. When summer came he said his hands swelled some, and on June 23 he first went to see Dr. Thorough about his hands, who testified that he

found swelling, redness, tenderness, and the fingers were rather rigid.

In the bill of exceptions two doctors testified as experts in the case. Dr. Ramacciotti was called by the plaintiff, and testified that he had been practicing in Nebraska City for about six years; that he examined the plaintiff, who gave him a history of having frozen his hands some two years previously. He took no X-rays, but put him through several tests, and discussed the matter with Dr. Thorough. Dr. Ramacciotti testified that he felt that the condition of plaintiff's hands was from the freezing, but admitted that he had arthritis in his hands.

The medical expert for the county was Dr. Thomas Weekes, who testified that he had been practicing 18 years; graduated from Northwestern University, and had taken postgraduate work at Mayo's and several other places; that he had in his practice attended probably a hundred cases of freezing and four or five hundred cases of arthritis. He first made an examination of the plaintiff on May 14, 1937, and took X-rays of his hands and back. He testified that the plaintiff had given him a history of pain in the shoulders and back for years; that he had two or three attacks of lumbago; that he had had arthritis; that his tonsils were badly infected. He testified positively that, if plaintiff's hands had been frozen, he would have been unable to go to work the next morning. In response to a question calling for his opinion as to the cause of difficulty of the plaintiff's hands, he stated that their condition was due to arthritis deformans, and that he did not believe that the plaintiff's hands were brought to their condition by freezing. He also testified that if plaintiff's hands had been frozen sufficiently to cause changes in the joints he would have had gangrene in the hands shortly after the freezing, and that the X-rays all show a diseased condition of the joints and bones due to progressive changes caused by arthritis deformans. He testified that he saw no evidence of the plaintiff having frozen his hands, and that the same condition which exists in plaintiff's hands is also shown to

exist in his shoulders, spine, hips, and feet. He further testifies that a freezing, to damage the muscles, would affect the tendons, and cause the surrounding tissues to adhere to the tendons, which condition was entirely lacking here.

Dr. Weekes also stated that tissue would be white when it was frozen, and then turn red, or perhaps purple, and if there was a third degree freezing it would slough off. He testified that the hands could not have been frozen if they were blue when he got in from work, when the family first saw him.

The evidence shows that plaintiff made no complaint that his hands were frozen until nearly five months afterward, when on June 23, 1936, Dr. Thorough diagnosed the case and told him his hands looked like they had been frozen, and while Dr. Thorough had treated plaintiff for other ailments back to 1934, he had never made any complaint about his hands.

In this case the burden of proof was upon the plaintiff to prove that he froze his hands on January 25, 1936, as alleged, and, further, that such freezing caused the injury to his hands of which he now complains.

It was the decision of the trial court that he had failed to make out his case, and after a careful examination of the record, we believe the decision of the trial court was right, and it is hereby

AFFIRMED.

WINTERS CREEK CANAL COMPANY, APPELLANT, V. ROBERT H. WILLIS, CHIEF OF BUREAU OF IRRIGATION, WATER POWER & DRAINAGE, ET AL., APPELLEES.

284 N. W. 332

FILED FEBRUARY 24, 1939. NO. 30437.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

Mothersead & York, for appellant.

Richard C. Hunter, Attorney General, C. G. Perry and *William H. Wright, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit for an injunction brought by the Winters Creek Canal Company against Robert H. Willis, chief of the bureau of irrigation, water power and drainage, and A. C. Tilley, state engineer. The purpose of the injunction was to prevent the officials of the irrigation department from interfering with the diversion of more than three acre-feet of water per acre of land within the plaintiff district in the year 1936. The injunction was denied by the trial court and plaintiff appeals.

The issues involved are identical with those in *Enterprise Irrigation District v. Willis,* p. 827, *post,* 284 N. W. 326.

The record discloses that plaintiff has a valid appropriation of water from the North Platte river in the amount of 124-2/7 second-feet with a priority dating of October 18, 1888, limited only to the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry and within the limits of the capacity of the diversion works then constructed to vest said appropriation. The record further shows that on August 27, 1936, plaintiff had diverted during the calendar year of 1936 for irrigation purposes 3.58 acre-feet of water for each irrigable acre of land within its district. It is the contention of the defendants that plaintiff is not entitled to more than three acre-feet of water under the provisions of section 81-6311, Comp. St. 1929.

The evidence offered is almost identical with that adduced in the companion case of *Enterprise Irrigation District v. Willis, supra.* The conclusions of fact to be drawn therefrom are necessarily the same. The applicable rules of law are fully considered in that case so that further discussion thereof is not necessary.

For the reasons stated in *Enterprise Irrigation District v. Willis, supra,* the trial court should have granted an injunction.

REVERSED.

ENTERPRISE IRRIGATION DISTRICT, APPELLANT, V. ROBERT H. WILLIS, CHIEF OF BUREAU OF IRRIGATION, WATER POWER & DRAINAGE, ET AL., APPELLEES.

284 N. W. 326

FILED FEBRUARY 24, 1939. No. 30438.

1. **Waters: APPROPRIATION FOR IRRIGATION.** An appropriator of the waters of a stream for irrigation purposes, who has had his appropriation properly adjudicated under the laws of the state, secures a vested right which is entitled to all the protection of a property right.
2. ———: ———. An appropriation for irrigation purposes in this state, made prior to 1895, was not limited as to quantity save and except that it must be for some useful and beneficial purpose and within the limits of the capacity of the diversion works.
3. **Constitutional Law.** The right acquired by a valid appropriation being a vested property right, it cannot be diminished by subsequent legislation so long as it is used by the appropriator for some useful and beneficial purpose.
4. **Waters: APPROPRIATION FOR IRRIGATION: "DUTY OF WATER."** The duty of water is such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops.
5. ———: ———: ———. The duty of water is a complicated question of fact that depends largely upon the circumstances of each particular case.
6. ———: ———: ———. In determining the quantity of water that can be put to a beneficial use of an appropriator, the policy of the law is to require, within reasonable limits, the greatest duty of water.
7. ———: ———: ———. In determining the duty of water, it is the amount of water delivered to the land and not the amount diverted from the stream that must govern.
8. ———: ———: ———. The prevailing customs and methods of applying water to the land in the interests of good husbandry in the territory where it is used are to be followed in determining the duty of water.

9. ———: ———: POLICE POWER. The state may regulate and control irrigation and the distribution and use of water therefor by virtue of its police power.
10. ———: ———: ———. It is a proper exercise of the police power to prevent the wasting of water or the diversion of more water than can be put to a beneficial use.
11. **Constitutional Law.** A provision in an act of the legislature arbitrarily limiting an appropriation to three acre-feet in the aggregate during one calendar year for each acre of land (Comp. St. 1929, sec. 81-6311) has no application to a valid appropriation which vested prior to its enactment.
12. **Case Limited.** *Vonburg v. Farmers Irrigation District*, 132 Neb. 12, 270 N. W. 835, limited.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

Mothersead & York, for appellant.

Richard C. Hunter, Attorney General, C. G. Perry and *William H. Wright, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit for an injunction brought by the Enterprise Irrigation District against Robert H. Willis, chief of the bureau of irrigation, water power and drainage, and A. C. Tilley, state engineer. At the time the suit was commenced the defendants were threatening to close the headgates of plaintiff's irrigation canal for the alleged reason that plaintiff had received all the water to which it was entitled during the irrigation season in question. In its petition the plaintiff asked that the defendant be enjoined from preventing it from diverting all the water that could be put to a beneficial use in the growing of crops. The trial court denied an injunction and plaintiff appeals.

The record discloses that in the year 1889 the Enterprise Ditch Company made an appropriation of water from the North Platte river, in accordance with the law of appropriation then in existence, in an amount in excess of 138.90

second-feet, subject only to the common-law rule that no more water could be diverted and appropriated than could be applied to a beneficial use. Thereafter the Enterprise Ditch Company sold its irrigation works and water appropriation to the plaintiff. Subsequent to the enactment of the irrigation law of 1895, providing for the creation of a state board of irrigation and for filing of claims and adjudication of water rights, a claim for such appropriation was filed with the state board of irrigation claiming an appropriation of 138.90 second-feet of water with a priority date of March 28, 1889. On January 7, 1897, the state board of irrigation entered its order, finding, adjudging and adjudicating that said appropriation was a valid appropriation for 138.90 second-feet of water with a priority of March 28, 1889, limited only by the rule that the amount so diverted should not be in excess of the amount that could be applied to a beneficial use. No appeal was taken from this order.

The irrigation laws of 1877 and 1889, the only ones on the subject at the time of plaintiff's appropriation, place no limitations upon the quantity of water that could be appropriated, save and except that the appropriation must be for some useful or beneficial purpose and within the limits of the capacity of the diversion works. See Laws 1877, p. 168; Laws 1889, ch. 68. The irrigation law of 1895 limited for the first time the quantity of water that could be appropriated to a specific amount, the statute stating "that no allotment for irrigation shall exceed one cubic foot per second for each 70 acres of land for which said appropriation shall be made." Laws 1895, ch. 69, sec. 20. The same act also provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act." Laws 1895, ch. 69, sec. 49. In 1911, the legislature placed a further limitation upon the quantity of water that could be appropriated, the statute providing "that no allotment for irrigation shall exceed one cubic foot per second of time for each seventy acres of land nor *three acre-*

feet in the aggregate during one calendar year for each acre of land for which such appropriation shall be made." Laws 1911, ch. 153, sec. 19. (Italics ours.) These same limitations appear in the irrigation law contained in the civil administrative code law of 1919. Laws 1919, ch. 190, p. 837. The 1919 law also provided: "Nothing in this article contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the fourth day of April, 1895." Laws 1919, p. 832. The last two cited sections of the civil administrative code of 1919 remain in force and are designated as sections 81-6311 and 46-506, respectively, Comp. St. 1929. It is the contention of the defendants that the limitation of three acre-feet in the aggregate during one calendar year for each acre of land for which the appropriation shall have been made, as contained in section 81-6311, Comp. St. 1929, applies to plaintiff's appropriation and, that amount having been exceeded at the time this suit was commenced, the plaintiff was not entitled to any more water and defendants should not be enjoined from closing the headgates of plaintiff's canal. Plaintiff contends that its appropriation is a right vested as of March 28, 1889, and that the statute in question has no retroactive force and, if such retroactive construction be placed upon it, it is violative of the due process clauses of the Constitution of Nebraska and the Fourteenth Amendment to the Constitution of the United States. Defendants contend that the statute is a proper exercise of the police power of the state and is not inhibited by either the state or federal Constitutions.

That the state may supervise and control the appropriation, diversion and distribution of the public waters of the state and impose that duty upon administrative officers is settled by our former decisions. *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286. Statutory provisions relating to the duties of administrative officers, in so far as they require or authorize a control and regulation of the diversion and distribution of appropriated waters in accordance with adjudicated priorities, are not inimical to the provisions of

the state and federal Constitutions. As was said in *Farmers Canal Co. v. Frank,* 72 Neb. 136, 100 N. W. 286: "It is the evident purpose of the law, taken as a whole, to enforce and maintain a rigid economy in the use of the waters of the state. It has been, and is, the policy of the law in all the arid states and territories to require and enforce an economical use of the waters of the natural streams. The urgent necessities of the situation compel this policy by the very force of circumstances. One of the main objects of the system of administration of public waters prescribed throughout the arid regions is to restrain unnecessary waste, and to provide for an economic distribution of that element so necessary to the very existence of agriculture in those regions. This is also the policy of the state of Nebraska in its regulation of the use of the waters of the state, and the law should be construed so as to effect a reasonable, just and economic distribution of water for irrigation purposes. The court will take judicial notice of the fact that there are hundreds of acres within the state susceptible of irrigation to every acre which there is water enough to supply, and it is obvious that a construction of the law that will best distribute the use of the waters is to be preferred, if such construction is not inimical to any constitutional inhibitions or limitations."

The various statutory provisions for the distribution of water among different appropriators according to their respective priorities by administrative officers of the state were undoubtedly enacted in furtherance of a wise public policy to afford an economical and speedy remedy to those whose rights are wrongfully disregarded by others, as well as to prevent waste, and to avoid unseemly controversies that may occur where many persons are entitled to share in a limited supply of public water for the purposes of irrigation. Such provisions have generally been sustained as a part of the police power of the state.

That an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right has been announced by this court on many oc-

casions. *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781; *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District,* 97 Neb. 139, 149 N. W. 363; *Nine Mile Irrigation District v. State,* 118 Neb. 522, 225 N. W. 679; *City of Fairbury v. Fairbury Mill & Elevator Co.,* 123 Neb. 588, 243 N. W. 774. This brings us to the question whether the subsequent condition imposed, limiting appropriations for irrigable lands to three acre-feet per acre for each calendar year, applies retroactively to appropriations obtained prior thereto, and, if so, is it inimical to the due process provisions of the state and federal Constitutions?

The record discloses that plaintiff had used 3.50 acre-feet of water for every acre of irrigable land in the district when the order was issued to close the headgate. Of this amount 3.03 acre-feet per irrigable acre was diverted from the North Platte river, while the balance was diverted from drainage ditches crossing plaintiff's canal. All measurements were made at the points of diversion and not at the points where water was delivered to the land. There is some evidence in the record to the effect that there was no loss by percolation, the usual losses of this character being offset by inflow. While this evidence was far from satisfactory, we are obliged to treat it as proved in view of the result at which the trial court arrived. It is also established that plaintiff had not exhausted its appropriation, assuming that the requirement as to beneficial use had been complied with and that statutory limitations as to quantity did not apply.

It is a principle of the common law that one may not divert more water, even under a valid appropriation, than he can put to a beneficial use. While many elements must be considered in determining whether water has been put to beneficial use, one is that it shall not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops. The extent to which landowners need and are entitled to have the benefit of irrigation water under a vested appropriation ordinarily depends upon aridity, rainfall, loca-

tion, soil porosity, adaptability to particular forms of production and the use to which the irrigable lands are put. In other words, the duty of water may be defined as such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops. 2 Kinney, Irrigation and Water Rights (2d ed.) secs. 902 and 903.

Many persons engaged in farming within the plaintiff district testified that the water used by them had been used in the usual and ordinary way to produce crops, that there had been no waste or misapplication of the irrigation water, and that, at the time the closing of the headgate was threatened, their crops were in need of water. They also testified that a failure to obtain water would have resulted in a material decrease in the crop returns from their lands.

The defendants produced the evidence of two experts who testified that they had made many experiments as to the amount of water required to grow certain crops on various kinds of lands, including the types of land found in the plaintiff district. The conclusions of these witnesses were that three acre-feet of water was sufficient to grow the kind of crops raised on the lands within the Enterprise Irrigation district. The experiments testified to were made under conditions very dissimilar from those under which the farmers of the plaintiff district were forced to operate. Whether the difference in conditions would account for the difference in the amount of water used would require us to delve into the realms of speculation and conjecture. There is no direct evidence that the water diverted by the plaintiff district had been wasted or put to any use other than a beneficial one. The evidence also sustains the plaintiff in its contention that the crops being grown on the lands in the district were in need of water at the time of the threatened closing of the headgate in plaintiff's canal. After a consideration of all the evidence in the record on the subject, we are of the opinion that it will not sustain a finding that irrigation water was wasted or put to other than a beneficial use in the usual, ordinary and recognized

method of applying irrigation water in that section of the state.

It must be borne in mind that the quantity of water that can be diverted under a vested water right for irrigation purposes is an element of importance equal to that of its priority in determining its value. While such a right may be regulated and supervised by the state and its administrative officers for the purpose of protecting all adjudicated rights of appropriators having an interest in the waters of the stream, yet a law of this character cannot operate to divest rights already vested at the time it was enacted. While vested water rights may be interfered with within reasonable limits under the police power of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is more than regulation and supervision and extends into the field generally referred to as a deprivation of a vested right.

In a similar situation the legislature of California declared that the term "useful or beneficial purposes" shall not be construed to mean the use in any one year of more than two and one-half acre-feet of water per acre in the irrigation of uncultivated areas of land not devoted to cultivated crops. It was contended that the act of the legislature was justified as a proper exercise of the police power of the state. In holding to the contrary, the supreme court of that state said: "It may be conceded that the phrase 'police power of the state' has, as to its scope and meaning been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress; but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of

wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare; but, on the contrary, must be conceded to be beneficial to each and all of these. The use to which the owners of lands contiguous to a river devote its soil by the aid of the waters of such river in the annual production of crops or cattle is such a use. The extent to which such riparian landowners need, and use, and are entitled to have the benefit of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case; upon location, aridity, rainfall, soil porosity, responsiveness, adaptability to particular forms of production, and many other elements which render the question essentially one for judicial inquiry and determination in all cases involving the proper use of water upon both cultivated and uncultivated areas. To concede that the state legislature has the right arbitrarily to fix as to the latter the amount of water which the riparian proprietor may take and use thereon would be to concede an equal power to make a like arbitrary fixation in respect to cultivated areas also, entirely regardless of the foregoing elements which are necessarily the determining factors in such fixation. To concede this would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character." *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 Pac. 607. We are of the opinion that the principle of law set forth in the foregoing case is correct and that it has particular application to the facts in the case at bar.

The evidence, as we view it, shows that the plaintiff district has diverted more than three acre-feet of water for every irrigable acre in its district. It further shows that the water used has been applied to a beneficial use without waste. It is not disputed that additional water was required when the injunction was threatened and that plaintiff's appropriation, without the limitations complained of, was

sufficient to provide it without infringing upon the rights of prior appropriators. The evidence of the expert witnesses tendered by the defendants was not sufficient to overcome the undisputed evidence offered by the plaintiff. We recognize the value of the experiments and research conducted by experts in their respective fields, but the duty of water is a complicated question of fact which must be determined in accordance with the prevailing custom in the locality where it is used. Wiel, Water Rights (3d ed.) p. 507. Neither is it contemplated nor required that each appropriator should use the latest and most approved scientific method in applying irrigation water to the land. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. (2d) 489, 45 Pac. (2d) 972; *Joerger v. Pacific Gas & Electric Co.,* 207 Cal. 8, 276 Pac. 1017.

We fully realize the difficulty of regulating and supervising the holder of an appropriation such as the plaintiff possesses. However, the difficulty must be overcome by regulation and control over the district by virtue of a proper exercise of the police power of the state. The difficulties of the situation cannot be advanced as a justification for violating vested property rights. The various irrigation acts of this state show an intent on the part of the legislature not to interfere with or impair appropriation rights which vested prior to the enactment of the 1895 irrigation law. Construing these acts in connection with the provision in section 81-6311, Comp. St. 1929, limiting the amount of water that could be used in a calendar year to three acre-feet for each irrigable acre, we reach the conclusion that this statutory provision was never intended to have any retroactive effect upon plaintiff's appropriation right which vested in 1889. To place any other construction upon the provision would make it inimical to applicable provisions in the state and federal Constitutions.

It is the contention of defendants that the case of *Vonburg v. Farmers Irrigation District,* 132 Neb. 12, 270 N. W. 835, is determinative of the issues involved in the case at bar. That case involved the contract rights of certain irrigators

under contracts entered into in 1890. In the opinion we said: "It is argued by defendants that plaintiffs, in any event, should be limited to three acre-feet per acre during each irrigation season. We are inclined to agree with this proposition." An examination of the record and briefs in that case shows that the limitation mentioned was not an issue in the case. It was not pleaded, briefed, nor presented to the court for determination. This court is committed to the rule that a cited case is authority only on the issues presented which were necessary to a proper decision of the case. We cannot therefore treat the *Vonburg* decision as controlling on the issues raised in the suit at bar.

We conclude that, under the facts presented to the trial court, an injunction should have been granted.

REVERSED.

HELENA AMELIA HOPPER, APPELLANT, V. CLIFF T. KOENIGSTEIN, APPELLEE.

284 N. W. 346

FILED FEBRUARY 24, 1939. No. 30447.

1. Workmen's Compensation: COMPENSABLE INJURY. Unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable under the workmen's compensation law, where the conditions of the employment expose the workman to the likelihood of such special risk, or where there is an immediate causal connection between the employment and the assault.
2. ———. The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
3. ———. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his

work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.

4. ———. Where an electrical refrigerating employee, who was sent to regulate the temperature control valves of a beer-cooling system in a beer tavern, which task required the making of a number of momentary adjustments over a several hour period, spent his leisure time in conviviality and beer-drinking with strangers in the tavern, including a salesman whose acquaintanceship he cultivated over a three and a half hour period, until the salesman became intoxicated and the employee himself had drunk six or seven glasses of beer, though without being shown to have been intoxicated, and the salesman struck the employee a fatal blow with his fist while they were drinking at the bar, no provocation being shown except such as may be inferred to have arisen from their continued fraternizing and drinking, such death was the result of a substantial deviation from the employment and of the creation of an independent hazard by the employee, and it did not arise out of the employment so as to be compensable under the workmen's compensation law.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Fay H. Pollock, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

JOHNSEN, J.

The sole question involved is whether the death of Roy Hopper arose out of his employment, so as to entitle his widow to benefits under the workmen's compensation law. The compensation court dismissed her claim, and the district court, to which she appealed, similarly denied a recovery. She has appealed to this court.

Hopper was employed as a service man in the electrical refrigerating business operated by defendant at Norfolk, Nebraska. On June 24, 1936, he was sent to Stuart, Nebraska, to repair and adjust a beer cooling system, which he had installed about a month previously, in the tavern

or beer parlor of Carroll Eaton. He began work about 1:30 p. m. The condenser motor, located in the basement of the tavern, had burned out. It was removed and replaced with a larger motor. The refrigerating system then had to be balanced by adjusting the pressure and temperature control valves, so the beer would have proper foam content. The time usually required for the whole task was approximately four hours, although there is testimony that, under special conditions, it might take ten or twelve hours.

Irvin Kouba, the salesman who had sold Eaton the equipment, accompanied Hopper to Stuart and remained with him most of the time he was working in the basement. About 4:30 p. m. Kouba and Eaton decided to go fishing. Hopper still had to adjust the valves which controlled the amount of refrigerant going into the coils. These valves were located on the main floor of the beer parlor, two inside and one just outside the cooling compartment.

From that time on Hopper struck up an acquaintanceship with Floyd Denton, a polish salesman, who had come into the beer parlor during the afternoon. For about three and a half hours they fraternized and drank beer with each other. Witnesses describe them as talking, laughing and joking together. Hopper offered to buy drinks for two women who came into the tavern. The four seated themselves at a table, indulged in sociability, and consumed several rounds of beer. Denton undertook to sing, but was stopped by the tavern keeper. When the women had to leave, Denton invited them to return later. Denton's indulgences ultimately produced intoxication. There is no testimony that Hopper became intoxicated, and, on the autopsy performed a couple of hours after his death, no evidence of alcoholism was observed. It does appear, however, that he drank at least six or seven glasses of beer. Denton says they had forty or fifty glasses together, but his testimony is not worthy of much credence. He was an ex-convict, with a somewhat extensive criminal record.

Hopper apparently made some momentary adjustments of the temperature control valves during the course of his

companionship with Denton. Kouba, however, personally checked the thermometer, on his return from the fishing trip about 8:00 p. m., and asked Hopper to adjust the valves. Hopper did so and then returned to the bar where he was drinking with Denton. No further temperature adjustments were made or needed, although the caps or covers on the valves were not yet replaced. Within a few minutes thereafter, Denton struck Hopper with his fist, rupturing a blood vessel in the brain, and causing Hopper's immediate death.

Hopper was shown to have been a peaceable man, of good reputation and character. There was nothing in the conversation between him and Denton that had attracted the attention of the five or six other persons standing at the bar when the blow was struck. The record discloses no acceptable provocation, notwithstanding Denton sought to claim, in a deposition taken at the state penitentiary, where he was committed for Hopper's death, that Hopper had called him a vile name. At the time of his arrest he had made the following simple explanation to the village marshall: "I thought I would just bloody up his nose for him, and I hit him a crack." The assault, seemingly, was one of those expressions of resentment or assumed superiority which drunken men sometimes unloose toward those with whom they have been fraternizing.

The widow insists in this situation that she is entitled to compensation on the grounds, (1) that the assault was occasioned by the special risk to which Hopper's work in the beer parlor exposed him, and (2) that, even if the assault did not result from exposure to any special risk, Hopper's fraternizing and drinking with Denton were such reasonable and permissible incidents of his employment as to constitute part of the hazard of the industry.

The general rule is that, unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable, (1) where the conditions of the employment expose the workman to the likelihood of such special risk, or (2) where there is an

immediate causal connection existing between the employment and the assault. 112 A. L. R. 1262, annotation.

The case of *Socha v. Cudahy Packing Co.*, 105 Neb. 691, 181 N. W. 706, where compensation was allowed for death resulting from the playful application of an air hose to the deceased's person by a fellow employee, is an example of the first class. It was there said: "If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment, and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it."

In the present case, however, we are unable to accept the contention that Hopper's death was due to the fact that he was required to work in a beer parlor. If the beer parlor constituted a special hazard, as it is argued, the assault was not occasioned by that hazard. Hopper was struck, not because of his presence in the beer parlor, but because of his relationship with Denton. It was the culminating incident of their extended fraternizing and drinking together. Denton did not assault a stranger, of whom there were several at the bar, but his comrade of the afternoon, toward whom he did not feel the usual conventional restraints. He had apparently grown tired or resentful of Hopper, or he wanted to display his superiority, for, as he expressed it immediately after the assault, "I thought I would just bloody up his nose for him." The compensation court and the district court were right, therefore, in holding that Hopper's death did not result from a special risk to which his employment had exposed him.

There remains to be considered the contention that Hopper's fraternizing and drinking with Denton were incidents which his employer might reasonably have expected he would do in connection with his work, and that the consequences thereof accordingly arose out of the employment and were part of the industrial risk.

The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from

causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.

The rule applicable to personal ministrations of the workman has been stated by a text-writer as follows: "Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compensation acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade." 1 Honnold, Workmen's Compensation, p. 381.

The cases of *Moise v. Fruit Dispatch Co.*, *ante*, p. 684, 283 N. W. 495, and *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853, illustrate this principle. *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N. W. 419, is an example of another type of incident which was recognized as not constituting such a substantial deviation from the employment as to create an independent hazard.

The test to be applied in such a situation to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. The rule necessarily is not capable of formulaic application, and the particular facts of each case must be carefully considered.

It may be that, in the circumstances of the present case, as the widow contends, Hopper could reasonably be expected to take a drink of beer as an incident of his employment. Hopper's employer in fact testified that sometimes a service man sampled beer to test its temperature, although the customary way was to look at the thermometer. But even if it were Hopper's privilege to sample beer in testing its temperature, or to take a drink as a reasonable incident of a leisure interval of his employment, that privilege could not be carried to the point of license, so that it, and not the employment, became the dominating factor in his conduct and relationship. The drinking by Hopper of six or seven glasses of beer in a three and a half hour period, the cultivation and continuance of a personal relationship with Denton to the point of Denton's intoxication, and the general sociabilities which were engaged in during the afternoon together created a hazard that went beyond the privileges or reasonable incidents of Hopper's employment. At the time of the assault, he stood at the tavern bar exposed to a formidable independent hazard which he, and not his employment, had created.

His death, as held by the compensation court and the district court, did not arise out of his employment, within the meaning and intendment of the workmen's compensation law.

AFFIRMED.

ROSE, J., dissenting.

The opinion of the majority reflects the care and skill with which the evidence has been reviewed and the law stated, but there seems to me to be a different view of the case, equally plausible and perhaps more in keeping with the purpose and spirit of the workmen's compensation law. It was said in a recent opinion, following earlier decisions:

"It was a purpose of that legislation to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his

dependents from becoming a public charge." *Moise v. Fruit Dispatch Co., ante,* p. 684, 283 N. W. 495.

A rule of interpretation reads thus:

"It has long been the policy of this state to give a liberal construction of the workmen's compensation law, so that its beneficent purposes might not be thwarted by technical refinement of interpretation." *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797.

Of course the death of an employee is not compensable, if it does not arise out of the employment. The question is, did it so arise within the meaning of the workmen's compensation law?

In the present instance defendant was engaged in a great industry—electric refrigeration. The employee was a skilled electrical engineer. He was a man of good character and good habits. He did not designate the place where the duties of his employment called him. He had no choice of location or environment. His employer selected for him the identical room where electrical adjustments were to be made and tested according to standards of the employee's profession. The employee was directed to work in a beer tavern and barroom where beer was sold over a bar by the drink to persons standing about it or seated at tables in front of it. During the entire time required for the performance of the duties of employee, he was mentally and physically alert. While he was awaiting the result of a scientific test in the beer-cooling system in the barroom, a dangerous criminal with aliases and prison records, who had been drinking at intervals in the barroom nearly all afternoon, struck the employee without provocation and killed him. This was the place selected by the employer for the performance of the employee's duties.

It is common knowledge that a barroom is a place of danger frequented by ruthless criminals. When such common knowledge was notorious, the legislature created a department of government to license beer taverns and keep barrooms under surveillance. An employer may anticipate such a danger when he sends an employee into an open barroom to work.

In my opinion an electrical engineer employed for a complete service requiring tests and awaiting results in putting a beer-cooling system in order performs the duties of his employment while thus waiting as well as when using tools in making the adjustments. He was then in the place of employment engaged in his employer's business. He had at the time and place no other task for his employer or himself. He was in the midst of conviviality. Thus surrounded, he did nothing to impair his capacity for service as an employee or to provoke an assault. No duty was neglected. If he was negligent in drinking beer on a summer day with a dangerous criminal whose character was then unknown, such mere negligence did not prevent the allowance of statutory compensation for his death. Where an electrical engineer is assigned to a particular job until finished and is required to make adjustments and await results of tests, the relation of employer and employee does not attach when he begins work on an adjustment and detach while waiting for the result of a test, though, in the interim, he may drink beer which he is cooling by scientific processes.

Refinements and subtle reasoning to show that an employee departs from and resumes his work in a case of this kind seem to me to be more consistent with the rigors of the old common law than with a modern statute simplifying judicial procedure for the benefit of workmen under the compensation law. In my judgment the employment, under such circumstances, is continuous until the work in hand is completed, unless terminated by the employer or by the wilful negligence of the employee or by an independent, self-created hazard. The work in the case at bar had not been completed when employee was killed. He was then awaiting the results of adjustments just made and dismantled appliances had not been replaced. Some of his tools were still in the barroom where he had been working. As I view the whole case, the homicide would not have been committed, except for the place of danger in which the employee was directed by his employer to work. It seems

to me the death of the employee arose out of his employment, within the meaning of the workmen's compensation law. The industry should bear part of the loss. The entire burden shou'd not fall on the dependent widow or on the public.

PAINE, J., dissenting.

With due regard for the opinion of the majority of the members of this court, I respectfully dissent from the opinion which has been adopted.

It is very evident that it is a close case, for many decisions can be cited from other states to support either theory. Hopper was sent by his employer to a tavern in Stuart to repair and adjust a cooling system which was out of order. This work required hours to correctly adjust the system so it would properly cool the beer and produce the proper foam content. He was a skilled workman at his place of employment. He had not completed the job assigned to him. He had made an examination of the cooling system and the guage within a few minutes of the time he was killed. He had not replaced the caps; his tools were ready for use.

All admit that his death occurred in the course of his employment. The only doubt in any one's mind is whether it arose out of his employment. His employer knew just the kind of a place to which he was sending him. There were very few stools in front of the bar. It was perfectly proper for him to occupy one of these stools, and it brought him in close contact with the man who killed him.

I will refer to a very few cases from other courts, which strike me as somewhat in point, and where recovery was allowed.

In *State v. District Court,* 134 Minn. 16, 158 N. W. 713, a bartender was accidentally struck in the right eye by a drinking glass thrown by a patron who was so drunk that he did not know what he was doing. The court here considered the question, did the accident arise out of the bartender's employment, and did such employment in such a place result in the accident? The court answers the questions in the affirmative.

In *Shaw, Ltd., v. Macfarlane*, 52 Scottish Law Rep. 236, a helper in a foundry was struck by an intoxicated stranger and injured, and the court held that he suffered the injury by an accident arising out of, and in the course of, his employment.

In a Texas case, an oil pumper was lured at night from the shack where he was required to sleep, and was shot and robbed. It was held that the heirs could recover. It is said that, if a fireman is playing cards at a fire station and is injured, no one would contend he was not at his employment. *Southern Surety Co. v. Shook* (1931) 44 S. W. (2d) (Tex. Civ. App.) 425.

In *Ivory v. Philpot Construction Co.*, 145 So. (La. App.) 784, a negro was asleep in a tent provided for highway employees, and was injured by a shot from a passing truck at about 10 p. m. A judgment for defendant was reversed, as the injury was held by the court of appeals for Louisiana to "arise out of and in the course of the employment."

In an opinion by Martin, C. J., of the court of appeals for the District of Columbia in 1936, he held that the injury of a cook in a restaurant, when he was suddenly stabbed by a drunk-crazed stranger, arose out of and in the course of his employment. The court said: "It was suffered by the claimant when at his place of duty, when upon the industrial premises of his employer, and while he was engaged at the work for which he was employed." *Hartford Accident & Indemnity Co. v. Hoage*, 85 Fed. (2d) 417. Many cases holding to the contrary can be found in the reports from states where a liberal interpretation is not followed, as in Nebraska.

I now submit a very few decisions from our own court, which should be carefully considered.

In *Ridenour v. Lewis*, 121 Neb. 823, 238 N. W. 745, it was held that, when a radio repair man in passing along the street in Omaha was assaulted by hold-up men, robbed of his own money, and killed, his death arose out of, and in the course of, his employment. Many cases are cited in this opinion, one from the House of Lords, the famous case

of *Dennis v. White & Co.* (1917) A. C. 479, Ann. Cas. 1917E, 325, which says that, where a workman meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of, as well as in the course of, his employment. See 15 Neb. Law Bulletin, 202.

In *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853, an employee was sitting at a table and eating dinner. The foreman got up from the table and knocked him down, and this court held that recovery could be had, and that his injuries arose out of his employment.

In *Boyce v. Burleigh*, 112 Neb. 509, 199 N. W. 785, an employee of a chicken hatchery, aged 19, with several other boys, was handling a gun, *contrary to the orders of his employer*, and this court held that there could be a recovery, for while the employee was not engaged in doing any work for the master at the time of the accident, still the accident *arose out of* the employment.

In *Urak v. Morris & Co.*, 107 Neb. 411, 186 N. W. 345, the plaintiff was struck on the hip by a shovel by a fellow workman, the blow being given just for fun, and this court held that the injury occurred during a personal altercation between the two, and that it did not arise out of the performance of any duty or service to the employer. This decision would be authority for denying compensation to the widow in the case at bar if the drunken ex-convict and the deceased had engaged in a quarrel, fight, or altercation, but the evidence does not sustain that conclusion.

In the case of *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N. W. 419, a traveling man for the Omaha Printing Company, using his own automobile, picked up a "hitchhiker," who shot and killed the traveling man four miles west of Schuyler in robbing him of his car, and in a careful review of many authorities it was held that the duties of the deceased required him to travel, and that highway robbery was a hazard of the highway, and of an employee who was required to travel the highway in the service of his employer. It was claimed in the *Goodwin* case that the de-

ceased, by inviting the "hitchhiker" to ride, brought the injuries upon himself, but the decision rejects this claim, and says that he did not disobey any directions or instructions of his employer in picking up a "hitchhiker." Can it be said in the case at bar that Hopper, by being in the tavern, as required by his employer, or in "jollying" the one who struck him, to keep him good-natured if possible, disobeyed any directions or instructions of his employer? Was he in any way responsible for his own death? Again, in the *Goodwin* case it is said that the traveling man did not step aside from his employment and act for himself on business or pleasure of his own in picking up a "hitchhiker" to visit with him. He was still *within the scope of his employment,* and the accident therefore arose out of and in the course of his employment, and that recovery was proper.

I do not think this court made a mistake in allowing the widow of the slain traveling man to recover for his death under the workmen's compensation law of Nebraska, but the cases are so closely in point that, if the decision is to stand in the case at bar, we should be consistent and set aside the opinion in the case of *Goodwin v. Omaha Printing Co., supra,* for there was no evidence there that the assault was directed against Goodwin because he was an employee, or because of his employment by the Omaha Printing Company.

In the case at bar, Hopper had not completed his work, but was engaged in it at the time he was killed. He was not loitering there for his own entertainment, but was required to be exactly where he was to properly adjust and test out the cooling machine, which it was his business to repair. In my opinion, considering the liberality with which the compensation law should be construed, these former Nebraska opinions are abundant authority upon which to justify a recovery in the case at bar.

HEINRICH FREDERICK MEYER, APPELLEE, V. EMMA SCHMIDT ET AL., APPELLANTS: DORA BANZHOF, CROSS-PETITIONER, APPELLEE.

284 N. W. 337

FILED MARCH 3, 1939. No. 30476.

1. **Contracts.** "Undue influence" may be defined as follows: "Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable." 2 Restatement, Contracts, 954, sec. 497.
2. **Fraud.** "There is no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest." 12 R. C. L. 237, sec. 8.
3. **Contracts.** The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless the person against whom relief is sought misrepresented the facts to him.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

McKillip & Barth and *Erwin A. Jones*, for appellants.

Harry L. Norval and *Peterson & Devoe, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Plaintiff and cross-petitioner each secured decrees of foreclosure. The defense was that the mortgagor, in concurrent mortgages given plaintiff and cross-petitioner, was weak-minded in business matters, could not read English, and executed the instruments through the undue influence of her husband. The defendants appeal.

Plaintiff filed a petition to foreclose a mortgage on 120 acres of land in Seward county because of the default in the payments due on two notes, one of $1,000 and one of $2,750. The cross-petitioner, Dora Banzhof, also brought action for the foreclosure of a similar mortgage for the de-

fault in payment of two notes for the same amounts, executed at the same time in the same transaction.

A single answer was filed to the petition and cross-petition, which answer includes a cross-petition, setting up many facts about the transactions between the various members of the family, and the line of descent, and setting out the homestead right of defendant Emma Schmidt in the property of her first husband, together with exhibit A, being a copy of the will of Diedrich Meyer, which will was witnessed by R. S. Norval, B. F. Norval, and Peter Goehner. This answer set out, as a defense to the mortgages, that defendant Emma Schmidt did not understand the nature of the transactions, or assent thereto, that she lacked the ability to comprehend, and that she signed her name to said instruments without knowing, or being advised of, her legal rights; that all the facts relating to the transaction were fraudulently withheld from said Emma Schmidt. The prayer of the cross-petition of Emma Schmidt and her husband is that, if the court finds that said instruments should not be canceled, then such instruments should be reformed so as to delete therefrom requirements for the payment of interest, and fix the due date at such time as Cajus Schmidt, husband of Emma Schmidt, finds himself able to make payments thereon, and that he be credited with the payment of $1,200 and given other relief. The replies thereto were general denials, together with specific denials that any fraud was at any time perpetrated upon the defendant Emma Schmidt.

It will thus be seen that the determination of the case rests primarily upon questions of fact rather than questions of law. The 200 pages of the bill of exceptions set out various family difficulties, and the private arrangements which were made to handle the real estate as some members of the family decided would be more equitable than as by the law provided.

The evidence of the defendants against the decree of foreclosure is largely based upon the incompetence and lack of mentality of Emma Schmidt. She testified that she was 52

years of age; that she was born in Ohio May 12, 1885. She testified that she came to Seward county when five years of age, and went to a parochial school every winter until she was 14 years of age. She told the studies which she took, and said she was pretty good in German. She testified that she married her first husband, Herman Meyer, November 10, 1915, and that he died May 22, 1916, and that she continued to live on the farm. She testified that she married her present husband, Cajus Schmidt, December 15, 1920. She said she did not know what a note was, nor could she write a check, and made a sorry attempt to write a check in court on the witness-stand, as well as an attempt to write down sums of money on a sheet of paper, and to add the sums dictated to her by her attorney. She admitted she took eggs to town for sale, but could only count them by sixes, it being claimed she can only count up to six. Upon direct and leading questions, she confessed she did not know what the papers were that she had signed at the Norval office, except that they were to "make settlement."

Only two questions were asked of her on cross-examination, bringing out the fact that whatever she did in Norval's office she did for her husband and at his request. Defense counsel claimed that it was clear from her evidence that she was not competent to contract by reason of her ignorance and weak understanding, and cites several Nebraska cases, *Meyer v. Fishburn*, 65 Neb. 626, 91 N. W. 534, *Wilson v. Bergmann*, 112 Neb. 145, 198 N. W. 671, and *Von Loh v. Graham*, 112 Neb. 306, 199 N. W. 553, which it is claimed are in point and support the proposition that contracts of a person of weak understanding will be set aside by the court when the conclusion can be drawn that deliberate judgment has not been exercised.

In the first of the three cases relied upon, we have a young man, 22 years of age, whose mental imbecility showed such a flagrant disregard of his own interests as challenged a strict examination of his contracts, and an experienced banker gained his confidence, and assisted him in making business deals, in each of which the young man lost out.

In the case of *Wilson v. Bergmann, supra,* it appears that Bergmann was 23 years old, had little education, could read with difficulty, and his perceptions were dull; his father said he paid two prices for everything he bought. In this land deal, an agent took him off by himself, and through fraud, artifice, and cunning, unduly influenced him to trade off his 80 acres of land, which his father had given him, for a piece of land of less value.

In the third case, Arthur Von Loh, incompetent, brought action by his guardian to recover a balance due in an adjustment of their mutual accounts.

We do not believe that the facts in any of these three cases are near enough in point with the facts in the case at bar to entitle the holdings therein to be accepted as precedents in this case.

It may be pointed out that the only evidence that Emma Schmidt was mentally incompetent was given by herself and her husband; that for over 45 years she had mingled with her neighbors, and done such business in selling produce as is customary for a farmer's wife. In addition to this, the evidence shows that, when her first husband died, she was appointed by the probate court of Seward county to have charge of administering his estate; that as administratrix she filed the necessary reports, which were approved, settled, and allowed.

The testimony of Attorney R. S. Norval as to the entire transaction in reference to the deed and two mortgages is given in the greatest detail. His recitation of his recollection of the conversations of each of the parties is so complete and satisfactory as to tend to explain away all inferences of incompetence and fraud charged in the case at bar.

The evidence of the attorney who prepared the deed alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions. *Little v. Curson,* 114 Neb. 752, 209 N. W. 737.

It is also charged in this case that Emma Schmidt signed the deed and mortgages by reason of the undue influence exercised upon her by her husband. "Undue influence" may be defined as follows: "Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable." 2 Restatement, Contracts, 954, sec. 497.

When we consider this accurate definition of undue influence, it is clear that the husband did not act, or advise his wife to act, in a manner inconsistent with good business judgment, as conditions were in 1925. Therefore, there was no such undue influence exercised by him which requires the instruments they signed to be declared void.

"There is no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest." 12 R. C. L. 237, sec. 8.

Mental incapacity to avoid a deed must be such that the grantor was so weak and unbalanced that he did not understand and comprehend the purport of what he was doing. *West v. West,* 84 Neb. 169, 120 N. W. 925; *Schley v. Horan,* 82 Neb. 704, 118 N. W. 659; *Hacker v. Hoover,* 89 Neb. 317, 131 N. W. 734; *Keedick v. Brogan,* 116 Neb. 339, 217 N. W. 583; *Broeker v. Day,* 124 Neb. 316, 246 N. W. 490.

The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless the person against whom relief is sought misrepresented the facts to him. 12 R. C. L. 235, sec. 6.

A memorandum opinion, signed by the trial judge, is found in the record, setting out the evidence and his conclusions thereon. Here is a paragraph therefrom:

"Cajus Schmidt, the husband of Emma Schmidt, pleads and proves that he spoke for his wife and acted for her, though she was present and fully understood what was being done. Emma Schmidt while not highly educated is

a wholesome pioneer type of woman, with good alert mental capacity for her station of life. She understood the pleadings she signed when explained and read to her by her counsel, and the evidence, coupled with her appearance and demeanor, convinced the court that she understood fully and agreed to the sale and executed the notes and mortgages as consummated on December 11, 1925. She also understood and concedes that the mortgage and note of January 30, 1931, are valid, binding obligations, in default and subject to final decree of foreclosure."

And, again, the trial judge says: "Nowhere in the evidence can we find anything to sustain the defense of mistake, or require reformation. Neither does the evidence show any fraud, either constructive or actual. The facts are simply that the Schmidts made a purchase in good faith at the time it was made. Under the conditions existing December 11, 1925, their bargain was a good one in every respect."

It is known to all that the unfortunate depression and repeated drouths have reduced all farm values in Nebraska to but a fraction of the values prior thereto.

"When the testimony of the witnesses upon the vital question involved is conflicting, this court will, while trying the case *de novo,* consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other." *Southern Surety Co. v. Parmely,* 121 Neb. 146, 236 N. W. 178. See, also, *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670; *Krelle v. Bowen,* 128 Neb. 418, 259 N. W. 48; *Turpin v. State, ante,* p. 389, 281 N. W. 800.

The fact that a deed and mortgages are drawn by an experienced attorney, when all of the interested parties are present, and the proposed settlement between them is deliberately discussed from every angle, and when it is admitted on all hands that the husband of the wife who is claimed to be mentally deficient was a man who was experienced in business matters and understood fully what was being done, and had advised his wife, who was 40 years of

age at the time, to sign the papers, which he joined her in executing, together with the fact that the disposition made would have been, in times of continued prosperity, of advantage to the husband and wife, does not, in the opinion of the court, justify granting the relief sought, even though, after years of continued depression and drouth, the entry of these decrees of foreclosure at this time proves to be very unfortunate.

A careful reading of the record in this case does not support the claim of incompetence on the part of the wife, or the charge of any fraud or overreaching in the execution of the instruments in this case, and the decree of the trial court is hereby

AFFIRMED.

REFRIGERATION DISCOUNT CORPORATION, APPELLEE, V. HENRY G. RICHARDS, APPELLANT.

284 N. W. 343

FILED MARCH 3, 1939. No. 30504.

1. **Trial:** DIRECTION OF VERDICT. Trial court may properly direct verdict for plaintiff where evidence sustains his cause of action and is insufficient to sustain verdict for defendant.
2. **Sales.** Where a buyer, relying on advertisements appearing in a trade journal, purchases portable ice cream cabinets, bearing a patent or trade-name, under a sales contract, containing the entire agreement between the parties and not warranting the machines, and where the buyer's evidence shows that he used the machines, paid some instalments thereon and serviced them for the leaking of gas, and did not make the fact of such servicing known to the seller until nearly a year thereafter, such evidence fails to establish the defense of reliance upon a breach of an implied warranty that the machines were reasonably fit for the general purpose for which they were manufactured.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Dryden, Dryden & Jensen, for appellant.

M. H. Worlock, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an action in replevin. At the close of all the testimony the court directed a verdict in favor of the plaintiff, and entered judgment "That the plaintiff's title and right of ownership and right of possession of the two refrigerators replevined in this action, at the time the same were replevined, was in the plaintiff and the same is hereby confirmed and that plaintiff have and it is hereby given judgment against the defendant and its damages for the illegal detention of property in the sum of one cent." From the verdict and judgment of the court, defendant appeals.

The petition is regular in form and the answer a general denial. The defendant, an ice cream manufacturer, relying absolutely upon certain advertisements, containing the specifications of "Kelvinator-Nash Ice Cream Cabinets," appearing in a magazine known as "Ice Cream Field," purchased three Kelvinator cabinets. Two of the cabinets are involved in this action, one having been returned by the defendant to the Kelvinator company. The two Kelvinator cabinets were purchased under written contract, specifying the amounts, the down-payments and the amounts to be paid in instalments. The 2-hole portable cabinet was purchased under contract dated June 19, 1931, and the 3-hole portable cabinet under contract dated July 2, 1931.

The defendant testified that the cabinets leaked gas, causing the melting of the ice cream contained therein, and that he was required to replace the product, to his damage; that he had expended for servicing the three machines the amount of $75, and on the two involved in this action $35; that he was unable to obtain service for the cabinets and had to rely upon a Frigidaire service man; that agents of the Kelvinator company called on him to collect and promised to "get the machines going," claiming he needed certain parts for them, and the agents did send him a couple of gauges, for which he paid, but did not service the machines

as promised. Most of the testimony of defendant was excluded on the theory that the contracts of purchase contained the entire agreement between the parties.

Section 69-415, Comp. St. 1929, a part of the Uniform Sales Act passed in 1921, is cited, the defendant contending that the court decided the case under subdivision 4 of said section which reads: "In the case of a contract to sell or a sale of a specified article under its patent or other trade-name, there is no implied warranty as to its fitness for any particular purpose;" further contending that subdivision 1 of said section of the statute is the one applicable to the facts in the case at bar, which subdivision reads: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose;" and that the greater weight of authority is that where goods are sold under a patent or trade-name for a specific purpose they come under the section with reference to merchantability; that is, subdivision 1 of section 69-415, Comp. St. 1929.

In the instant case, the defendant had the use of the two refrigerators through the summer of 1931. In the record is a letter from him to the plaintiff, dated January 22, 1932, which is an explanation of his reasons for not keeping up the payments on the cabinets. On June 20, 1932, practically a year after having contracted for one of the cabinets, the defendant, by letter to plaintiff, wrote about his inability to procure the money with which to make the payments, and complained of the servicing of the cabinets, of the leaking of gas, and stating that the cabinets were of no use to him when there was no one to service them; and on July 29, 1932, he again, by letter, complained of the leaking of gas in the cabinets and stated that he would ship back one of the cabinets and wanted credit on two cabinets for the return of one.

The plaintiff on June 23, 1932, responded to defendant's letter of June 20, 1932, stating that the conditional sales contract was binding upon the defendant for the payment of the items, but that plaintiff was "not disposed to take an unnecessarily arbitrary position in the matter," and asked cooperation on the part of the defendant to the extent of turning over to the railroad the cabinets, consigned to the Kelvinator Sales Corporation, and to ship them direct, freight collect, and that it would accept the cabinets in full settlement of the balance due on the three contracts, offering to return the canceled contracts upon receipt of the cabinets. On July 5, 1932, plaintiff wrote defendant, calling his attention to its letter of June 23, 1932, and asking him to advise the company if he had sent the cabinets; that, if they had been shipped, to send the bill of lading; if not, to send the cabinets at once; that it could not continue to hold the offer open if the cabinets were kept over the present season, and asking that the company be advised by telegram of the status of the matter. The two cabinets were not sent, but were retained by the defendant.

To clarify defendant's position, we quote the following from his brief: "If, because of the plan of construction or the character of materials used, the article will not accomplish that for which it purports to be designed, there is a breach of the implied warranty of merchantability, as well as the implied warranty of general fitness, and in this respect it is immaterial that the machine was sold under a patent or trade-name, or as a specific standard article;" citing annotations, 59 A. L. R. 1224, and 90 A. L. R. 422; *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Ia. 703, 98 N. W. 580; *Ideal Heating Co. v. Kramer*, 127 Ia. 137, 102 N. W. 840.

The view has been taken that the law implies a warranty in a contract for the sale of patented machines that they are reasonably adapted to the purpose for which they are made. There is an implied warranty that the machine, when manufactured, will not be unfit for its purpose on account

of defects in workmanship or the materials used by the manufacturer. 24 R. C. L. 202, sec. 475; *Nettograph Machine Co. v. Brown,* 28 Okla. 436, 114 Pac. 1102, 34 L. R. A. n. s. 737; *Rodgers v. Niles,* 11 Ohio St. 48, 78 Am. Dec. 290.

No representation was made by the defendant to any agent of the company as to the use to which the machines were to be put, and the specifications appearing in the magazine, upon which plaintiff relied when purchasing, contained no warranty, but advertised the efficiency and economy of the machine over other types of refrigeration. This is the only evidence on this proposition.

"In case of the sale of machinery as an ordinary article of commerce, whether the seller is the maker or manufacturer or not, there is, according to the better view, no implied warranty that the machine will do work for which it is ostensibly intended in any particular manner. * * * It has also been held that under a written contract to place a patent system of refrigeration in a refrigerator to be sold and furnished to the buyer, with nothing in the contract beyond the name of the system to show that it was anything in the nature of a refrigerating process, or that it was designed or intended to preserve meats, or that the buyer had anything to do with meats, no implied warranty exists that the system will preserve meats for any particular length of time, nor can such a warranty be shown by parol evidence." 24 R. C. L. 202, sec. 475. See *McCray Refrigerator & Cold Storage Co. v. Woods & Zent,* 99 Mich. 269, 58 N. W. 320; *Seitz v. Brewers' Refrigerating Machine Co.,* 141 U. S. 510, 12 Sup. Ct. Rep. 46. In the instant case, the contract expressed no warranty of any kind or nature, but specifically provided that it contained all the agreements existing between the parties.

Assuming defendant's contention to be the rule, the evidence shows that the cabinets were reasonably fit for the general purpose for which they were manufactured, and fails to show that the defendant relied upon an implied warranty, as contended by him. The machines did refrigerate; that was their purpose. The servicing was the de-

fendant's principal objection. As previously stated, he retained the cabinets, paid instalments thereon up to May 4, 1932, and used the cabinets for some period of time, and not until a year later did he make objection. The correspondence between the parties indicates more or less of a controversy relative to the payments made or to be made. An analysis of the defendant's evidence, if admitted, fails to show a reliance upon an implied warranty, if it did exist, as contended by him.

Defendant offered evidence to show the return of the one cabinet and that he asked any amounts accruing to him therefrom be applied to the credit of the two remaining cabinets, citing authority holding that a defendant in a replevin action may, under general denial, prove any act which amounts to a defense. *Securities Investment Corporation v. Krejci*, 132 Neb. 146, 271 N. W. 287. In that case, this court held:

"In a replevin action to foreclose a mortgage on chattels, the defendant under a general denial may prove damages resulting from a breach of warranty in the sale thereof, as an offset to show that plaintiff at the commencement of the action was indebted to her in an amount at least equal to the amount due on the note."

In the instant case, defendant had made payments amounting to $88.83 on the cabinets which he returned to the plaintiff in August, 1932. No further payments were made on the remaining cabinets in his possession. No complaint was made about these two machines, which were subsequently taken in replevin, April 20, 1933. Under the terms of the contract, plaintiff was entitled to interest, and if the defendant had received credit for the payments he had made on the returned cabinet, he would be in default on the two remaining cabinets at the time they were taken in replevin, and upon which there was due at that time the sum of $198.34. Defendant's requested credit on the cabinet returned would have been $88.83, leaving a balance still due of $109.51. Obviously, this evidence would not show that the plaintiff was indebted to the defendant at

the commencement of the action in an amount equal at least to the amount due on the two machines taken in replevin, which is the rule announced in *Securities Investment Corporation v. Krejci, supra.*

For the reasons given in this opinion, we hold that the trial court properly directed a verdict for the plaintiff.

AFFIRMED.

NETTIE A. SHEA, APPELLANT, V. WILLIAM FRANCIS SHIERMAN ET AL., APPELLEES.
284 N. W. 340

FILED MARCH 3, 1939. No. 30477.

Judgment: RES JUDICATA. Where a settlement agreement, made between the contestants and the beneficiary of a will, is later sought to be revoked by the beneficiary, on fraud and other grounds, but is upheld by the court, and the rights of the contestants in the property involved are specifically confirmed, a subsequent attempt of the beneficiary further to attack the settlement agreement on the ground of mistake, and to remove part of the property from the operation thereof, on the ground that it had been given to the beneficiary prior to the decedent's death and was not properly part of the estate, the facts of such alleged claim being known to the beneficiary at the time of the former proceedings, is *res judicata.*

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

McNeny & Sprague, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This action was brought to have plaintiff decreed to be the owner of some shares of capital stock and some real estate. The answer pleaded *res judicata.* The trial court entered judgment for defendants, and plaintiff has appealed.

Plaintiff is a sister of John W. Shierman, deceased, and defendants are his minor children. Shierman's will made plaintiff his sole beneficiary. An order of probate was entered in the county court, but thereafter, within the proper term, application was made, on behalf of the minor children, to set aside the probate and to permit a contest of the will on the ground of mental incapacity and undue influence. Plaintiff then entered into a settlement agreement with the proper representatives of the minor children, by which certain personal and real property was to be transferred and conveyed to them on final settlement of the estate, in consideration of the withdrawal of their application and objections to probate. The probate was thereby permitted to stand. Plaintiff waited until the expiration of the term of court at which this was done, and then attempted to file in the county court a renunciation and revocation of the settlement agreement. Defendants thereupon filed an application to have the contract declared binding on plaintiff and to have it entered as the judgment of the court for purposes of final distribution. On a denial of this application, defendants appealed to the district court where an order was entered giving plaintiff an election to accept the terms of the settlement agreement and permit judgment to be entered thereon, or to have the order of probate vacated and the matter set for trial on the objections of defendants to probate. Plaintiff filed an election to stand upon her revocation of the settlement agreement, and defendants appealed to this court where the settlement agreement was upheld and confirmed, and the judgment of the district court was reversed. *In re Estate of Shierman,* 129 Neb. 230, 261 N. W. 155.

When the mandate was issued, judgment was entered in the district court declaring the settlement agreement binding, quieting defendants' title to the real estate described therein, and directing plaintiff to turn over the personal property covered by the agreement. Plaintiff filed a motion for a new trial, on the hearing of which she sought to claim that some of the property covered by the settlement agree-

ment was not properly part of Shierman's estate, but was her individual property. She attempted to prove, by affidavits in support of the motion, that the deceased had given her deeds to some of the real estate included in the settlement a long time prior to his death, although she had not recorded them until after he died. She attempted to prove further that he had also executed assignments to her of some shares of capital stock. These were still in his lock box at the time of his death, but were contained in an envelope bearing her name. The motion for a new trial was overruled and plaintiff appealed to this court, where the order of the district court was affirmed. *In re Estate of Shierman,* 132 Neb. 45, 270 N. W. 841. In a motion and brief for rehearing filed by plaintiff, it was contended that "the court erred in decreeing title directly to these boys of property the title to which had been transferred by John W. Shierman in his lifetime to Nettie A. Shea, as there was no consideration for same and the county court does not have jurisdiction of such property and cannot determine its title." The motion for rehearing was overruled and mandate duly issued.

Plaintiff then brought this action to have it decreed that the real estate and capital stock in question were her individual property. She alleged that, as to the property involved, "said purported agreement * * * was wholly without any consideration passing to Nettie A. Shea and the same was not intended or made as a gift, and therefore said judgment thereon is not valid and binding on this plaintiff." Whether the property involved had passed from the decedent to plaintiff prior to his death, so that it could have been claimed not to constitute part of his estate, is here immaterial and no longer litigable. The settlement agreement treated it as part of the estate. For purposes of the settlement, it would continue to remain such until the agreement was set aside or reformed.

When plaintiff asserted a right to renounce and revoke the agreement, and defendants asked the court to decree its obligations to be binding and enforceable, plaintiff, in liti-

gating the issue, was required to present to the court every known, material ground in favor of such right of revocation which then existed and on which she intended to rely. If the property involved had been included in the settlement agreement by fraud or mutual mistake, that question was a material consideration in determining whether a right of revocation existed, or whether the agreement should be confirmed and enforced. Plaintiff, as a matter of fact, directly injected the question of her ownership of the stock and real estate at various stages of the proceedings, as has already been pointed out. Whether she is now satisfied with the manner and extent of its injection is unimportant. It was necessarily involved in the proper determination of the issue presented, and the decree confirming the settlement agreement and quieting title to the real estate in defendants and declaring them to be the owners of the capital stock was *res judicata* of the questions now sought to be raised. *Lowe v. Prospect Hill Cemetery Ass'n,* 75 Neb. 85, 106 N. W. 429; *Cromwell v. County of Sac,* 94 U. S. 351, 24 L. Ed. 195.

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE, V. MARY SUVERKRUBBE ET AL., APPELLANTS.

284 N. W. 342

FILED MARCH 3, 1939. No. 30519.

1. **Mortgages.** The fairness of the price on a foreclosure sale is a question primarily for the trial court. Where there is no irregularity or taint in the proceedings, confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness.
2. ———. A purported motion to set aside a foreclosure sale on the ground that the bid is so inadequate as to be inequitable and to shock the conscience is nothing more than a formal objection to confirmation, and is automatically disposed of by the order of confirmation; and the failure of the trial court to make a separate ruling thereon is not error.

3. ———. It is not error for the trial court to grant a writ of assistance on oral application at the time of confirmation of a foreclosure sale, where the right thereto clearly exists and the parties affected are before the court.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Charles W. Haller, for appellants.

Cranny & Moore, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is an appeal from an order confirming a mortgage foreclosure sale, on the grounds, (1) that the price was inadequate; (2) that the court entered confirmation without ruling on defendant's motion to set aside the sale; and (3) that it was improper to provide for a writ of assistance in the order of confirmation.

On the first point, defendant contends the bid was unconscionable. The property was sold to plaintiff for $8,095, the amount of its decree, interest and costs. The question of value was tried on affidavits. Five affidavits for plaintiff fixed the value at around $8,000, and five affidavits for defendant at around $15,000. Plaintiff was the sole bidder at the sale. Practically 90 days elapsed before confirmation, but no offer on the part of any one to make a higher bid on a resale was shown. The fairness of the price on a foreclosure sale is a question primarily for the trial court. Where there is no irregularity or taint in the proceedings, confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness. The rule has been repeated so often that citation of authority is unnecessary. The record in this case does not produce such a conviction.

On the second point, it is argued that the court erred in confirming the sale without expressly ruling on defendant's motion to set aside the sale. The basis of the so-called

motion was that the bid was so inadequate as to be inequitable and to shock the conscience. This was nothing more than a formal objection to confirmation which required no separate ruling, but was disposed of automatically by the order of confirmation.

On the third point, defendant insists that the court erred in providing for a writ of assistance in the order of confirmation where there was no express prayer therefor in the petition or in the motion for confirmation. Procedural form is unimportant except as it serves to safeguard the substantive rights of litigants or to avoid confusion and instability in judicial proceedings. There could be no prejudice in granting a writ of assistance on oral application at the time of confirmation, where the right thereto clearly existed and the parties affected were before the court. *Metropolitan Life Ins. Co. v. Heany,* 122 Neb. 747, 241 N. W. 525.

The judgment is affirmed, with leave to redeem before issuance of the mandate.

AFFIRMED.

BEN HANSEN, APPELLANT, V. PAXTON & VIERLING IRON WORKS, APPELLEE.
284 N. W. 352

FILED MARCH 3, 1939. No. 30583.

1. **Workmen's Compensation:** APPEAL. No certified transcript of the pleadings and orders of the workmen's compensation court is required to be filed in the district court in order to give it jurisdiction of an appeal in which a rehearing or retrial has been waived before the compensation court.
2. ———: ———. To give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court, it is only necessary that there be filed, within fourteen days, a waiver of rehearing and a notice of intention to appeal in the compensation court, and an application or petition for a trial *de novo* in the district court, setting out the errors on which it is sought to reverse or modify the award of the compensation court. The statement of errors in

the application or petition does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial.

3. ———: ———. No præcipe need be filed or summons issued and served in the district court in order to give it jurisdiction of an appeal from the workmen's compensation court in a case where rehearing or retrial has been waived in the compensation court. In such a case, the clerk of the district court, as a matter of course, is required immediately to serve copies of the application or petition upon the adverse party by mail or otherwise, as provided in section 48-174, Comp. St. Supp. 1937.

4. ———: ———. While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the supreme court does not commence to run until the overruling of such motion.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed.*

McKenzie & Dugan, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Kennedy, Holland, De Lacy & Svoboda, Edwin Cassem and *G. H. Seig, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is an appeal from an order of the district court in a compensation case, sustaining a special appearance and entering a dismissal on the ground of lack of jurisdiction.

Plaintiff instituted proceedings before the workmen's compensation court, and, after a hearing before one of the three judges thereof, his claim was denied and dismissed on its merits. Within fourteen days, he filed a waiver of rehearing and a notice of appeal in the compensation court, and a petition on appeal in the district court. Attached to his petition in the district court, as exhibits, were purported copies of the petition, answer, award, waiver of rehearing,

and notice of appeal in the compensation court. Defendant filed a special appearance, which the district court sustained, objecting to the jurisdiction of the court over its person, on the grounds, (1) that no certified transcript of the pleadings and orders of the compensation court had been lodged in the district court, and (2) that there had been no præcipe for summons filed and no summons issued and served upon defendant out of the district court.

The first question for consideration is whether a certified transcript of the pleadings and orders of the compensation court is necessary to give the district court jurisdiction of an appeal from the decision of one judge of the compensation court, where a rehearing before the full court is waived.

Section 48-174, Comp. St. Supp. 1937, prescribes the general procedure in compensation cases. Subdivisions (1), (2), and (3) make provision for the filing of a petition, issuance and service of summons, and the filing of an answer in the compensation court. Subdivision (4) provides for an initial hearing before one of the judges of the compensation court. Subdivision (5) grants the right to a trial *de novo* either before the compensation court en banc or in the district court. A rehearing or retrial may be had before the full compensation court upon the filing of an application, within fourteen days, "plainly stating the errors on which such party relies for reversal or modification," together with a copy thereof which the court is required to serve immediately upon the other party at interest.

Where such a trial *de novo* has been had before the compensation court en banc, an appeal can be taken to the district court only by filing therein, within fourteen days, "a verified petition setting forth the contention upon which such party relies for reversal or modification, together with a transcript of the pleadings before the compensation court and the orders of said court certified to by the clerk thereof and file within thirty days from the date of said final order a transcribed copy of the testimony and evidence taken before said compensation court, which tran-

script when certified to by the stenographer who made the record and settled by the compensation court as such shall constitute the bill of exceptions." The statute then continues: "Within seven days after the filing of such petition on appeal, a copy thereof shall be served upon the adverse party in the same manner as summons is served as provided in * * * subdivision (2) hereof and return of service shall be made within five days thereafter. Within fourteen days after the filing of the bill of exceptions, the district court * * * shall proceed to hear argument of counsel on the contentions raised in such petition and render judgment thereon according to the form of law: Provided, that a judgment, order or award of the compensation court shall be set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the order or award was procured by fraud. (3) That the findings of fact by the court are not supported by the record. (4) That the findings of fact by the court do not support the order or award."

It will be noted that, where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding. The legislature evidently intended the mode of procedure set out above as the principal channel for disposing of compensation disputes. An alternative but subordinate right to a trial *de novo* in the district court was, however, provided where a retrial before the compensation court is waived. *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576. It apparently was a carry over of the right which had existed under the previous statute, in connection with awards of the compensation commissioner, whom the compensation court superseded. While chapter 57, Laws 1935, preserved the right of trial *de novo* in the district court, it abolished the procedure which had been provided therefor by section 48-139, Comp. St. 1929.

The only part of section 48-174, Comp. St. Supp. 1937, expressly dealing with the right to a trial *de novo* in the

district court is in the form of a proviso to a definition of the power of the compensation court to modify or change the findings or award rendered by it on a rehearing, and reads as follows: "Provided, however, that in any case the employer or the injured employee or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court * * * which court shall have the authority to hear and determine the cause as in equity, when the same for all purposes shall be tried as one in equity; and that said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial *de novo*." This proviso is independent of the rest of section 48-174, Comp. St. Supp. 1937, except in its reference that "said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court."

Defendant argues that the provision for a certified transcript, required on a review by the district court of an award of the compensation court en banc, is intended to apply equally to an appeal to the district court where rehearing or retrial before the compensation court has been waived. All of the provisions of the statute quoted in the fifth paragraph of this opinion clearly are intended to apply only to cases where a rehearing or retrial is had before the compensation court. The requirement for a transcript is dealt with coordinately and in the same sentence with a requirement for a bill of exceptions. The latter obviously has no application except to a retrial before the compensation court en banc. The joint requirement for a transcript and bill of exceptions shows that it was intended to be limited to appeals in the nature of error proceedings, following a trial before the compensation court en banc.

In addition to this, the language of the statute applicable to an appeal to the district court, where a rehearing before the compensation court is waived, is clear, even though the procedure prescribed may seem informal. An "appeal to

the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court." The right to a review or retrial before the compensation court en banc is referred to in the statute as an appeal to the compensation court. In either the compensation court or the district court the proceedings had are trials *de novo*. It was not unnatural for the legislature to term a resort to either of them as an appeal, nor, since the purpose of both proceedings is the same, to provide identical procedure in obtaining a retrial.

The right to a trial *de novo* in the district court where rehearing is waived in the compensation court, and where notice of appeal is given under section 48-157, Comp. St. Supp. 1937, depends, therefore, not upon the filing of a certified transcript of the pleadings and orders of the compensation court, but upon the filing, within fourteen days, in the district court, of "an application for a rehearing (trial *de novo*) plainly stating the errors on which such party relies for reversal or modification." Since the proceedings before both the compensation court and the district court are trials *de novo*, the statement of errors does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial. The records of this court indicate that the interpretation of the statute here adopted is that which has been followed generally by the profession in past proceedings.

While, as has been indicated, the procedure on an appeal to the district court for a trial *de novo* is a bit informal, it is nevertheless adequate, especially if there is attached to the application or petition in the district court copies of the pleadings, orders and other pertinent filings in the compensation court, such as was done in this case. In any event, the district court, of course, has the right to require that the issues be clarified in any necessary way, not as a matter of jurisdiction, but for purposes of orderly disposition.

The next question involved is whether it is necessary, in

order to give the district court jurisdiction on an appeal from the award of one of the judges of the compensation court where a rehearing before the full court is waived, to file a præcipe and have summons issued and served in the district court. The statute makes no such requirement. As has been already pointed out, the procedure prescribed for obtaining a trial *de novo* before the compensation court en banc or in the district court is the same. Section 48-174, Comp. St. Supp. 1937, provides that a copy of the application for rehearing or retrial must be filed, and "the said court shall then immediately serve upon such other parties by mail or otherwise, as elsewhere herein provided, a copy of said application for rehearing." It is the clerk's duty to have such service made, without the necessity for a præcipe. *McIntosh v. Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152.

The final point of defendant is that plaintiff failed to perfect his appeal to this court within thirty days from the judgment of dismissal in the district court. Plaintiff filed a motion for a new trial and perfected his appeal within thirty days from the overruling thereof. While such a motion is not necessary in a compensation case, where one in due form is filed, the time for perfecting an appeal to the supreme court commences to run from the overruling of the motion. *Lincoln Packing Co. v. Coe*, 120 Neb. 299, 232 N. W. 92.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

JENNIE H. HAYMAN, APPELLEE, V. CITY OF GRAND ISLAND, APPELLANT.

284 N. W. 733

FILED MARCH 10, 1939. No. 30474.

1. Taxation. Section 77-1923, Comp. St. 1929, authorizes the bringing of an original action to recover taxes paid, where the taxpayer claims that the tax was levied or assessed for an illegal or unauthorized purpose.

2. **Eminent Domain.** It is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation, and, therefore, illegal. *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368.
3. **Action.** "The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and * * * ordinarily * * * if defendant, without objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced." 1 C. J. 1152.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Paul C. Holmberg and *A. G. Abbott*, for appellant.

H. G. Wellensiek, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

The defendant city of Grand Island levied a special assessment on plaintiff's property in that city to pay for the expenses and damages occasioned by the widening of a street. Plaintiff paid the tax and brought an original action to recover the same, alleging that the assessment was for an illegal purpose. Plaintiff recovered judgment for a part of the tax paid. Defendant appeals.

Prior to the events causing this litigation, Court street in the city of Grand Island was sixty feet wide to the west of Pine street. Sycamore street is immediately east of and parallel to Pine street. As originally platted, Court street did not extend east from Pine to Sycamore street.

In 1914 the owners of what is now the south half of Court street between Pine and Sycamore streets conveyed the same to the city of Grand Island for public street purposes. Court street, west of Pine street, was then sixty feet wide, and east of Pine street, was thirty feet wide.

The plaintiff is the owner of the property to the north

of Court street between Pine and Sycamore streets, upon which were located her home and two rental residence properties. The defendant is a city of the first class. By ordinance passed February 19, 1930, the defendant condemned the south thirty feet of plaintiff's property for street purposes, and thereby widened Court street to sixty feet from Pine street to Sycamore street. The property so taken was appraised, and plaintiff's damage determined to be $1,800. The defendant paid the amount to the plaintiff, and it was accepted by her. No complaint is made as to those proceedings.

The city council of defendant sat as a board of equalization to determine the benefits to plaintiff's property. Plaintiff appeared before said board and objected to the assessment of her property, claiming that no benefits accrued thereto as a result of the widening of said street. Defendant found that benefits did accrue to plaintiff's property, and, by ordinance passed November 19, 1930, levied special taxes to pay for the expenses and damage of widening Court street in accordance with the benefits so found. By that ordinance, defendant assessed a total of $1,053.30 against plaintiff's property. The remainder of the $1,800, paid plaintiff as damages, was assessed in relatively small amounts against several pieces of adjacent property.

On November 29, 1930, the defendant notified plaintiff of such special assessment; that it would become delinquent December 21, 1930, and that it would draw interest at the rate of 1 per cent. per month thereafter. On December 19, 1930, plaintiff paid said special assessments under protest, and so notified the treasurer of the defendant. Plaintiff gave as her reasons, among others, that the special tax levied against her property was in excess of any benefits to said property; that it was a confiscation of said property without due compensation and without due process of law; that said property was not benefited by the widening of Court street; that the city was without legal authority to assess special taxes against the property; that they were invalid, inequitable, and unjust; that they were dispropor-

tionate to other taxes levied on other property so situated; that they were not levied in accordance with the benefits derived by the property, but were arbitrarily assessed; and for those reasons were illegal. Plaintiff demanded repayment within the time provided by law, and notified the city that, if it failed to repay said sum, legal proceedings would be started to recover the same. The defendant did not refund the taxes so paid. On February 7, 1931, plaintiff began this action, and service was had upon the defendant city on February 9, 1931.

Plaintiff did not prosecute her cause with diligence. The defendant did not insist upon a disposition of the action. Exactly seven years after the original petition was filed, the matter was put at issue upon plaintiff's second amended petition, an amended answer, and reply.

The amended petition recited the facts in detail, and concluded that "said special taxes are unauthorized, invalid, illegal, and confiscatory." Plaintiff prayed for the recovery of said special taxes so paid. Defendant's amended answer alleges the benefits it claims accrued to plaintiff's property, the finding of the board of equalization, the assessment, that no proceedings in error were had, and that the assessment thereby became final. The reply was a general denial. The case was tried in March, 1938.

Defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action; that the plaintiff's remedy was to take the matter to the district court on error proceedings; that the plaintiff had not proceeded in that manner; that the present proceeding was a collateral attack; that the plaintiff's suit was prematurely brought, and that the petition does not show that the tax was for an illegal or unlawful purpose. Defendant moved for a directed verdict on substantially the same ground. The motion was overruled by the trial court. The jury rendered a verdict for the plaintiff in the sum of $777.44.

Defendant's motion for a new trial was overruled. In that motion, and on appeal in its errors assigned in this

court, defendant raises substantially these propositions: *First,* that the plaintiff should have appealed by error from the assessment of benefits made by the city council, and that an original action cannot be maintained to recover the tax; *second,* that the court erred in instructing the jury that, if they found that the special tax was in excess of the benefits accrued, they should include, in their verdict, interest on the amount of such excess; *third,* that the action was prematurely brought.

Section 77-1923, Comp. St. 1929, provides as follows: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for any illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax be levied or assessed for illegal or unauthorized purpose; but in every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, may proceed in the following manner, viz.: First. If such person claim a tax, or any part thereof; to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon. * * * Second. If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed *for an illegal or unauthorized purpose,* or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other

proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state, or the county, city, village, township, district or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded *within ninety days* thereafter, may sue such county, city, village, township, district or other subdivision for the amount so demanded; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor *with interest* and the same shall be collected as in other cases." (Italics ours.)

The provisions of this statute were analyzed in the case of *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, 69 N. W. 958. This court there held:

"It is very evident that the legislature has, by the foregoing section, provided two separate and distinct modes of procedure to obtain illegal taxes which have been paid under protest,—one by the presentation of a claim for such taxes, by the person paying the same, to the county board for audit and allowance, with the right of appeal from the decision provided for; and the other remedy being by suit at law to recover such taxes. But it will not escape notice that the method of procedure is determinable by the ground or grounds which render the taxes illegal. The first method provided in the section is limited to taxes imposed on property not subject to taxation, or to taxes rendered invalid by the reason of double assessment of the same property, *while suit* against the county, city, or other subdivision *is authorized* when the tax paid under protest was imposed for an *illegal* or unauthorized purpose, or for any reason other than for double assessment, or that the property was exempt from taxation, is invalid." (Italics ours.) That holding was affirmed by this court in *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274, 78 N. W. 502.

This court had the matter specifically before it in the

case of *City of Omaha v. Hodgskins,* 70 Neb. 229, 97 N. W. 346. The procedure there used has been followed by the plaintiff in the instant case. This court there held that an original action could be maintained under the statute to recover illegal taxes which have been paid.

The case of *Cain v. City of Omaha,* 42 Neb. 120, 60 N. W. 368, is a case strikingly similar to the one at bar. There a street was opened, plaintiff's property taken, and the plaintiff was awarded damages in the sum of $3,010. The city council then assessed benefits in the sum of $2,000 against plaintiff's property, and the remainder was assessed in small sums over a large amount of property in the neighborhood. In that action, plaintiff brought suit for the recovery of the taxes under the provisions of what is now, in a modified form, section 16-628, Comp. St. 1929. The first paragraph of the syllabus of that case is:

"The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, *and therefore illegal.*" (Italics ours.)

The court further stated: "It is but just that where a portion of one's property is taken under circumstances allowing no deduction for benefits conferred upon the remainder, the remainder, if specially benefited, should bear its fair proportion of the cost of the improvement; but the courts will not permit municipalities to evade the provision of the Constitution, that the property of no person shall be taken or damaged for public use without just compensation, by paying the compensation and then under the guise of taxation taking it back from the person entitled." The rule announced in *Cain v. City of Omaha, supra,* has been repeatedly followed in subsequent decisions of this court.

This court in *Munsell v. City of Hebron,* 117 Neb. 251, 220 N. W. 289, stated: "The owner of property in a municipality cannot lawfully be assessed for a public improve-

ment thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question."

The plaintiff proceeded properly in filing an original action for the recovery of these taxes.

Defendant next contends that interest should not have been allowed. That contention is specifically answered by the statute itself which provides that the suing taxpayer shall recover judgment for the illegal or unauthorized taxes "with interest."

Defendant next contends that plaintiff's action was prematurely brought. The statute provides that the person claiming the tax to be illegal or unauthorized may make a demand within thirty days after payment for the repayment thereof, and that, if the same shall not be refunded within ninety days thereafter, the taxpayer may sue.

The demand for the refund was made December 19, 1930. The ninety-day period had not expired at the time plaintiff brought her suit. On March 9, 1931, the defendant filed a special appearance herein on the ground that "the court has no jurisdiction over the subject-matter." No ruling thereon is shown. November 6, 1931, plaintiff filed an amended petition. November 20, 1931, defendant filed a motion, and February 18, 1932, filed a demurrer to said amended petition. March 13, 1933, plaintiff filed a second amended petition. April 12, 1933, defendant filed a motion, and February 15, 1937, filed a demurrer. On May 15, 1937, the defendant answered. So far as we can determine from the record submitted, the question of prematureness was not raised until defendant filed its amended answer October 25, 1937, in which it was merely stated "that plaintiff's action is immaturely brought in any event."

"The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and it is ordinarily held that if defendant, without

objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced." 1 C. J. 1152.

Without deciding whether or not the action was prematurely brought, we hold that that objection was waived.

We have examined the other assignments of error made by the defendant, and do not find that any substantial right of the defendant has been affected thereby.

The judgment of the district court is

AFFIRMED.

ALFONS HIESTAND, APPELLEE, V. RUDOLPH A. RISTAU ET AL., APPELLANTS.
284 N. W. 756

FILED MARCH 10, 1939. No. 30571.

1. **Workmen's Compensation:** IMMUNITY. The word "requires" means compel or exact, as used in that part of the workmen's compensation law granting immunity from workmen's compensation to an owner who requires his contractor to procure compensation insurance for the latter's employees.
2. ———: ———. Under the workmen's compensation law, an owner who inserts in a contract with his contractor a futile promise by the latter to procure compensation insurance for the workmen he employs to repair a building for the owner does not thus escape liability for their compensable injuries.
3. ———: ———. In the workmen's compensation law, the terms "any scheme, artifice or device" creating a joint and several liability of owner and contractor for compensable injuries to workmen, do not necessarily imply active fraud or evil design.
4. ———: LIABILITY. The making of a contract between owner and contractor for the repair of buildings, including a promise by the contractor to procure compensation insurance for workmen, the failure of the owner to exact compliance with that promise and the making of the repairs by the contractor without such insurance, *held* sufficient to prove a "scheme, artifice or device" making both owner and contractor liable to contractor's employees for compensable injuries, within the meaning of the workmen's compensation law.
5. ———: "EMPLOYEE." In the workmen's compensation law, the provision that the word "employee" shall not be construed

to include "any person whose employment is casual, and which is not in the usual course of trade, business, profession or occupation of his employer," means conjunctively both casual employment and usual course of trade.

6. ———: "CASUAL EMPLOYMENT." Within the meaning of the workmen's compensation law, "casual" employment, exempting employer from liability for compensation, means occasional; coming at certain times without regularity, in distinction from stated or regular. Comp. St. 1929, sec. 48-115.
7. ———: ———. Employment of a carpenter by a contractor for several weeks continuously to repair farm and other buildings for the owner is not "casual;" nor is an accidental injury of the carpenter in such work noncompensable as farm labor, within the meaning of the workmen's compensation law.
8. ———. The repairing of buildings on farms temporarily owned by a life insurance corporation, to make the farms rentable and salable for insurance revenue to meet maturing insurance obligations of the insurance corporation, is in its usual course of business, within the meaning of the workmen's compensation law.
9. ———: "SEASONAL EMPLOYMENT." "'Seasonal employment' refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year." *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N. W. 546.
10. ———: ———. The trade or occupation of a carpenter may be pursued throughout the year and is not "seasonal" in the sense that it is a defense to the claim of a carpenter for workmen's compensation.
11. ———: AWARD. An award of 20 per cent. for permanent partial disability in the loss of the use of a carpenter's left foot as the result of a fall causing a fracture of the os calcis, *held* not excessive.
12. ———: PENALTIES. Where there is a reasonable controversy over the liability of defendant for workmen's compensation, penalties for "waiting time" are not recoverable.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Brown, Fitch & West and *Robins & Yost*, for appellants.

John P. Corbett, Harold M. Shultz and *Cook & Cook, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. While Alfons Hiestand, a carpenter, was engaged in shingling a barn, the scaffolding which had protected him on the roof gave way and he fell to the ground, November 20, 1936, a distance of 14 feet, and broke the os calcis of his left foot. Pleading that the accident and resulting injury arose out of and in the course of his employment, he presented to the compensation court a claim for compensation, joining as defendants Rudolph A. Ristau and the Equitable Life Assurance Society, a corporation owning the farm in Dodge county on which the barn was located. Ristau was the contractor employed by the insurance corporation to furnish the materials and labor and to repair the barn.

In the petition for compensation, it was alleged in substance that the wages of plaintiff were $19.20 a week; that he was totally disabled for three months; that the permanent partial loss of the use of his left foot was 50 per cent.; that the insurance corporation is liable for compensation for failure to require the contractor to carry compensation insurance for the benefit of his employees; that defendants adopted a scheme, artifice or device to have the barn repaired without liability to workmen for compensable injuries.

The compensation court adjudged awards, based on employee's weekly wages of $19.20, in favor of plaintiff and against both defendants, as follows: Total temporary disability of employee from November 20, 1936, to April 16, 1937, 21 weeks, at $12.80 a week; compensation for a 20 per cent. permanent partial disability in the loss of the use of employee's left foot, $12.80 a week for 30 weeks from April 16, 1937. The same awards were made upon appeal by defendants to the district court for Dodge county, where attorney fees of $137.50 were taxed against defend-

ants in favor of plaintiff as costs. From the judgment of the district court defendants appealed to the supreme court.

The Equitable Life Assurance Society, defendant, called "corporation" for brevity, takes the position that it is not liable to plaintiff for compensation, because it required its contractor, Ristau, to procure compensation insurance for his employees pursuant to the workmen's compensation law, which provides:

"Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen." Comp. St. 1929, sec. 48-116.

The corporation conducts a life insurance business under a charter from the state of New York and has authority to transact business in Nebraska and to invest insurance funds in mortgages on Nebraska lands and to take and hold for five years title to such lands in payment of loans of insurance funds. It temporarily owns in this state 20 farms thus acquired, among them the farm on which plaintiff was injured as the result of falling from the roof of the barn. The evidence upon which the corporation relies to prove that it required its contractor to procure compensation insurance is found in a common form of contract between owner and contractor and providing:

"Contractor shall maintain, in connection with this work, insurance as will protect him from claims under workmen's compensation act of the particular state in which he is operating and from any other claims under personal injuries or otherwise which may arise from this work; contractor shall save the owner harmless and indemnify him from every expense, liability or payment, by reason of any injury to person or persons, or damage to property resulting from an action or operation under this order."

The contractor did not perform the agreement to procure compensation insurance and said he was without means to do so. Did the corporation "require" such protection for employees by the mere unperformed agreement to procure this insurance? The answer depends on what the lawmakers meant and expressed by the use of the word "requires," as it appears in the workmen's compensation law. Compliance with that requirement was a condition of immunity from liability for workmen's compensation. The letting of a contract to a contractor who could not and did not procure such insurance did not accomplish the legislative purpose or comply with the condition for immunity or protect workmen by insurance. The lawmakers intended the requirement to be effective and necessarily used the word "requires" with that end in view. An unperformed agreement for compensation insurance is not the requirement of it within the meaning of the provision quoted from the workmen's compensation law. "Requires," in the sense therein used, means "compel" or "exact," adjudicated definitions. *Kennedy v. Falde,* 4 Dak. 319, 29 N. W. 667; *Meagher v. Van Zandt,* 18 Nev. 230, 2 Pac. 57; *State v. McCord,* 8 Kan. 232; *Vogrin v. American Steel & Wire Co.,* 263 Ill. 474, 105 N. E. 332; *Butler Street Foundry & Iron Co. v. Industrial Board,* 277 Ill. 70, 115 N. E. 122. The contractor did not procure compensation insurance nor pay compensation. The "good faith" of the corporation, therefore, in inserting in its contract with the contractor his futile promise to procure compensation did not amount to a requirement therefor within the meaning of the statute

nor comply with the statutory condition for immunity for compensable injuries to the workmen.

The statutory terms "any scheme, artifice or device" creating a joint and several liability of owner and contractor for compensable injuries to workmen, do not necessarily imply active fraud or evil design. *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645. The making of the contract obligating the contractor to procure compensation insurance, the failure of obligee to exact performance of that duty, and the action of the contractor in making the repairs without procuring the insurance, amounted to a "scheme, artifice or device" which made both owner of the barn and the contractor liable for compensable injuries of workmen. Comp. St. 1929, sec. 48-116; *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645.

To reverse the allowances for compensation both defendants invoke the statutory provision that the word "employee" shall not be construed to include "any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer." Comp. St. 1929, sec. 48-115. This means conjunctively both "casual employment" and "usual course of trade, business, profession or occupation." *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645; *Guse v. Wessels,* 132 Neb. 41, 270 N. W. 665. It is argued by defendants that plaintiff's employment was casual within the meaning of both provisions creating immunity from liability for compensation. The preponderance of the evidence, including the surrounding circumstances, is to the contrary. Plaintiff was a carpenter by trade and was employed by the contractor as such. He was not employed for a single job and reemployed for each of a series of jobs. He testified he started to work for Ristau March 5, 1936, and worked for him until November 20, 1936, the date of his injury; that his employment was continuous; that he was told in advance the work of his employment would last six to eight weeks; that he worked as carpenter for his employer on different contracts, describing them; that Ristau and others

were at work on the same roof at the time of the accident. It was stipulated that plaintiff's compensation was 40 cents an hour, or $12.80 a week for compensable injuries, if any. The statute defines "casual" as used by the lawmakers in reference to compensation, as follows:

"The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " Comp. St. 1929, sec. 48-115; *Bridger v. Lincoln Feed & Fuel Co.*, 105 Neb. 222, 179 N. W. 1020.

Under this definition, the better view of the evidence is that the employment of plaintiff in the case at bar was not casual. Nor was the injury noncompensable as resulting from farm labor. *Guse v. Wessels*, 132 Neb. 41, 270 N. W. 665.

Was the employment of plaintiff within the "usual course of the trade, business, profession or occupation" of the corporation? It was employer of the contractor and was engaged in the life insurance business. In the course thereof it legally invested insurance funds, made loans and secured them by mortgages on farms. For the payment of loans it lawfully took title to land mortgaged in its business and may hold the title for five years for the purposes of sale and conservation of insurance property to meet maturing insurance obligations. The repairing of buildings on such farms to make them salable and rentable for insurance revenue is in the usual course of the insurance business of the insurance corporation. It seems clear from the statute and the evidence that this defense is unavailing.

It is further insisted that the employment was seasonal and that consequently compensation was erroneously allowed under the workmen's compensation law. Comp. St. 1929, sec. 48-126. The law is that " 'Seasonal employment' refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year." *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N. W. 546. See *Gorham v. Kiewit*

Sons Co., 129 Neb. 277, 261 N. W. 353; *Lincoln Gas & Electric Light Co. v. Watkins*, 113 Neb. 619, 204 N. W. 391. The true import of the evidence is that the trade or occupation of a carpenter may be pursued throughout the year. It follows that it is not seasonal as a defense to workmen's compensation.

Compensation for a 20 per cent. permanent partial disability for the loss of the use of employee's left foot is challenged by defendants as excessive. That there was a permanent partial disability in the use of the ankle is clearly shown, but experts were not in accord on the exact percentage of loss. A physician who made an examination June 4, 1937, found a disability of 25 per cent., with the prognosis there will be "marked improvement." The same physician said later that there was still a 25 per cent. disability in ladder climbing. There is also testimony that the medical advisory board of the compensation court in June, 1937, after an examination and the aid of X-rays showing a fracture of the os calcis with position and alignment normal and slight limitation of motion, found a 20 per cent. disability. One expert testified to the opinion there was no permanent disability, but, on the entire record, defendants insist there is no evidence to sustain a permanent partial disability exceeding 10 per cent. The estimates limited to that loss, however, seem to disregard to some extent the 25 per cent. disability in ladder climbing, an essential activity of a carpenter. Defendants' view of the evidence seems to overlook plaintiff's own evidence of disabling pain and also weakness from continuous use of the left foot. The compensation court and the district court found the permanent partial disability to be 20 per cent. and that estimate is adopted as the proper finding under the evidence.

In addition to compensation, plaintiff seeks penalties for "waiting time" under the workmen's compensation law. Comp. St. 1929, sec. 48-125. There was a reasonable controversy over the liability of defendants for compensation and the claim for penalties was properly disallowed by the

district court. *Updike Grain Co. v. Swanson,* 104 Neb. 661, 178 N. W. 618.

On a review of the whole case, error prejudicial to defendants has not been found. Attorney fees of $100 in favor of plaintiff for services of counsel in the supreme court will be taxed against defendants as costs.

AFFIRMED.

WILLIAM HELGENBERGER, APPELLEE, V. RUDOLPH A. RISTAU ET AL., APPELLANTS.
284 N. W. 761

FILED MARCH 10, 1939. No. 30572.

Rulings sustaining awards for workmen's compensation against contractor and owner of building repaired by former's employees in *Hiestand v. Ristau, ante,* p. 881, 284 N. W. 756, followed.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Brown, Fitch & West and *Robins & Yost,* for appellants.

John P. Corbett, Harold M. Shultz and *Cook & Cook, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. The claim arose from the same accident as that for which compensation was allowed in the companion case of *Hiestand v. Ristau, ante,* p. 881, 284 N. W. 756, determined herewith. The facts are the same with the exception of injuries and amount of compensation. While William Helgenberger, plaintiff, a carpenter, was engaged in shingling a barn, the scaffolding which had protected him on the roof gave way and he fell to the ground, a distance of 14 feet, and broke the os calcis of his right foot. Pleading that the ac-

cident and resulting injury arose out of and in the course of his employment, he presented to the compensation court a claim for compensation, joining as defendants Rudolph A. Ristau and the Equitable Life Assurance Society, a corporation owning the farm in Dodge county on which the barn was located.

The compensation court awarded plaintiff against both defendants compensation as follows: For temporary total disability from November 20, 1936, to June 11, 1937, 29 weeks, $12.80 a week; for a 50 per cent. permanent partial disability for the loss of the use of plaintiff's right foot for 75 weeks from June 11, 1937, $12.80 a week. Upon appeal by defendants to the district court for Dodge county the allowances were the same as in the compensation court and attorney fees of $137.50 were taxed against defendants in favor of plaintiff as costs. From the judgment of the district court defendants appealed to the supreme court.

The allowances below are adopted on appeal as proper under the evidence. Upon a review of the entire record, prejudicial error in the proceedings and judgment of the district court has not been found. The material questions presented herein are determined in the companion case and the discussion of them need not be repeated. Similar services were rendered by the same counsel for the two plaintiffs and attorney fees of $100 for each will be taxed against the defendant as costs in the supreme court.

AFFIRMED.

BEN F. CONKEY, APPELLEE, V. HANS KNUDSEN, JR., ET AL., APPELLEES: HANS KNUDSEN ET AL., APPELLANTS: RALPH GEORGE ET AL., INTERVENERS, APPELLEES.

284 N. W. 737

FILED MARCH 10, 1939. No. 30483.

1. Waters: RIPARIAN RIGHTS. "Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land

belongs to the riparian proprietor." *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372.

2. **Adverse Possession.** "The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." *Ellsworth Corporation v. Stratbucker*, 134 Neb. 246, 278 N. W. 381.
3. **Quieting Title.** When it appears that one who was the owner of lands to which accretions had attached conveys a part of said lands but retains possession of the accretions and the purchaser disclaims any interest therein, such person may properly maintain a suit to quiet the title thereto in himself as against defendants who prove no interest in or title to the accreted lands.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

Malcolm R. Smith, S. W. McKinley, Jr., and *William P. Warner*, for appellants.

George W. Leamer, W. V. Steuteville, Sidney T. Frum, P. F. Verzani and *D. M. Vinsonhaler, contra.*

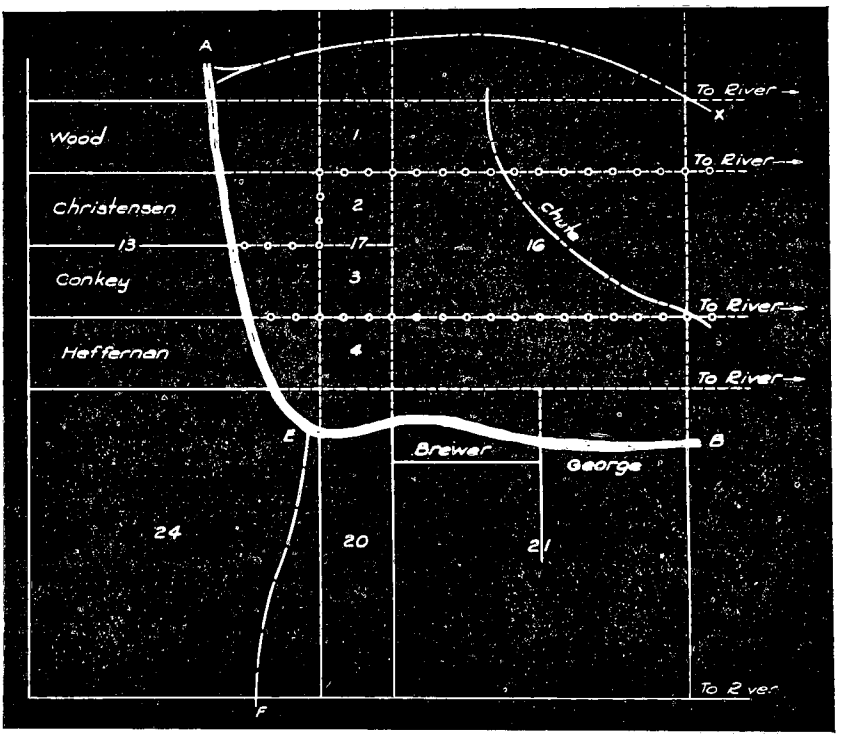
Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit to quiet title to certain accreted lands along the Missouri river in Dakota county. The trial court entered an order quieting plaintiff's title to the lands in question as against the defendants Hans Knudsen, Sine Knudsen, Maggie Leedom, and Otis Wood. From this order all of the defendants appeal.

The record discloses that plaintiff became the owner of the north half of the south half of section 13, involved herein, by the will of his cousin, Frank Conkey. Plaintiff likewise became the owner of the south half of the north half of section 13 and subsequently sold it to one Christensen. The accreted lands in question lie to the east of these two tracts. No claim is made by Christensen to any of the accreted lands other than those contained within the boundaries of the south half of the north half of section 13. Plaintiff claims the accretions lying east of the east

boundaries of the lands owned by Christensen and himself and which are shown in part in the following plat as lots 2 and 3 in section 17 and the south half of the north half and the north half of the south half of section 16. The accreted lands claimed by plaintiff are shown on the plat by the broken lines interspersed with small circles.



The accreted lands involved lie between the Missouri river and what is termed the high bank in the evidence. The high bank is represented by the line on the plat extending from points A to B, and was the west bank of the Missouri river in its former location in 1909. The river shifted its course so that in 1910 and 1911 it ran approximately as represented by the line extending from points A to X. The line designated as A to F represents the course of the river as shown by the government survey of 1858. It must also be borne in mind that the designation of the

accreted lands as sections, or parts of sections, is done only for convenience. The lands originally surveyed as such sections have been washed away and replaced by the accreted lands heretofore described.

It is not disputed that the defendant Otis Wood is the owner of the high bank in the north half of the north half of section 13, designated on the plat by the name of "Wood." Neither is it disputed that he owns the accreted lands east of the high bank represented on the plat as lot 1 in section 17 and the north one-fourth of section 16. The record discloses that Wood moved on the north half of the northeast quarter of section 13 in 1926, and at the same time took possession of the accreted lands immediately to the east of it. This defendant claims also to be the owner of the accreted land designated on the plat as lot 2 in section 17 by adverse possession. When defendant Wood located on the north half of the northeast quarter of section 13, a fence extended east along his south line from the high bank to a point 30 rods east of the east line of section 17. The evidence of the defendant Wood is that there was no gate in this fence between lots 1 and 2 until 1933, at which time he fenced in lot 2. The adverse possession of Wood prior to 1933 is based on the fact that he pastured some cows on that tract in 1926, and subsequent thereto. The testimony of Wood is that the division fence between lots 1 and 2 was in poor shape and that he drove his cattle through where the fence was down. After a consideration of all the evidence we are convinced the trial court rightfully determined that Wood failed to establish title by adverse possession.

The defendant Hans Knudsen claims title to the south half of section 17 and the south half of section 16 as shown on the plat. He went into possession in 1933, and fenced in parts of the land in 1934 and 1935. Clearly, no title was obtained by adverse possession as the statutory period of ten years could not possibly have elapsed. Sine Knudsen claims some interest in this tract by virtue of a quitclaim deed. Title was not shown to be in the grantor and consequently the deed can convey no interest to Sine Knudsen.

Defendant Maggie Leedom claims title to the south half of the northwest quarter and the southwest quarter of the northeast quarter of section 16 as shown on the plat. The record is clear that this defendant did not move onto this land until 1934. She also claims title by a quitclaim deed. No title was shown to be in the grantor and adverse possession was not shown for the statutory period.

All defendants contend, however, that plaintiff has failed to show title in himself and invoke the rule that he must rely upon the strength of his title and not upon the weakness of that of defendants.

The record discloses that Frank O. Conkey became the owner of the south half of the northwest quarter and the southwest quarter of the northeast quarter of section 13 by a deed in 1909. Frank O. Conkey also became the owner of the north half of the southeast quarter of section 13 by deed in 1926. The high bank ran through both of these tracts. All of the accreted lands between these tracts and the Missouri river became the property of Frank O. Conkey by virtue of these deeds. It is true that the sale of the south half of the north half of section 13 to Christensen would ordinarily convey the accretions between this tract and the river to the purchaser. The record shows, however, that Christensen never claimed any accreted land east of the west boundary of section 17 and that Frank O. Conkey's heirs remained in possession of these accretions and claimed them up to the date of the trial of this case. It cannot be questioned that Christensen and plaintiff could agree upon their respective interests in the accretions adjoining their lands regardless of their exact legal rights. *McCoy v. Paxton*, 156 Ia. 194, 135 N. W. 1091.

The following principles of law appear to control the decision of the case: "It is well settled that where, as in this case, the water of a river recedes gradually, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor." *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372.

"The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." *Ellsworth Corporation v. Stratbucker*, 134 Neb. 246, 278 N. W. 381.

It is clear in the record that after plaintiff sold the south half of the north half of section 13 to Christensen, he retained possession of the accretions thereto. The only person who might establish a record title to any of these accretions is Christensen and he disclaims any interest therein. We think plaintiff has a sufficient title to maintain this suit against these defendants under the holding in *Ellsworth Corporation v. Stratbucker, supra*, wherein the court said: "The action is not ejectment but a suit in equity which is maintained to quiet title under the law of Nebraska while plaintiff is in possession. Defendants argue that plaintiff's title fails because a deed from Stevens to plaintiff is missing and that it must rely upon the strength of its own title and not upon the weakness of that of its adversary. In this connection the claims of defendants must be scrutinized. They pleaded adverse possession, but an examination of the record on that issue fails to prove they were in actual, open, exclusive and continuous possession of the strip of land in controversy under claim of ownership for the full statutory period of ten years. Adverse possession by defendants, therefore, was not proved. *Williams v. Lantz*, 123 Neb. 67, 242 N. W. 269. They failed also to prove title or other interest in themselves. Having no defense to plaintiff's cause of action and no valid claim for affirmative relief in equity, plaintiff, as against them, made a *prima facie* case for the quieting of title."

The judgment of the district court is

AFFIRMED.

MARIE E. HILD, APPELLANT, V. GEORGE M. HILD, APPELLEE.
284 N. W. 730

FILED MARCH 10, 1939. NO. 30540.

1. **Divorce.** "Whether a divorce from bed and board or an absolute divorce shall be granted is a question vested in the sound discretion of the trial court." *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22.
2. ———: ALIMONY. The trial court, in exercising its sound discretion to allow or refuse to allow permanent alimony, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, whether the property was accumulated before or after the marriage, and all other circumstances pertinent to the case.
3. **Record** examined and *held* to support the findings and decree of the trial court.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

William R. Patrick, for appellant.

Johnsen, Gross & Crawford, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

Plaintiff brought an action for separate maintenance, charging defendant with extreme cruelty. Defendant denied the allegation of cruelty and, by cross-petition, charged the plaintiff with extreme cruelty. The reply was a general denial.

The defendant, a man 62 years of age, previously married and divorced and the father of grown daughters, and the plaintiff, a woman 54 years of age, twice previously married and once divorced, and the mother of a grown daughter, were married April 7, 1937. At the time, plaintiff was a widow living in Oklahoma City, operating a boarding and rooming house, and met the defendant through her sister, a resident of Omaha. The defendant went to Oklahoma City, proposed marriage to plaintiff, and they were married

in Papallion, Nebraska, and went to Omaha, where they lived in a three-room apartment. The evidence is in sharp conflict and a detailed statement thereof would unnecessarily lengthen this opinion. We will, therefore, state the substance of the claims of the respective parties.

The evidence of plaintiff and her witnesses, her daughter, brother-in-law, sister and mother, shows excessive drinking of beer and whisky by defendant and drunkenness two or three times weekly; that he always had a case of beer and some whisky in the home; that his conduct was intolerable, his personal habits vile; he was unclean about his person and in his bed failed to properly attend to the wants of nature; that previous to his marriage he had lived in his own home in Plattsmouth, Nebraska, having a housekeeper to care for it. Two letters appear in the record showing rather close and intimate relations between the housekeeper and the defendant. Plaintiff received one letter and had full knowledge of another to her husband. Plaintiff states that the letters caused her much anxiety concerning the previous moral conduct of her husband and lessened her trust in him; that his attitude changed immediately after receipt and discussion of the letters; that he would leave the apartment and remain away all day, was difficult to get along with, and stated: "Well there is going to be a hell of a change before we get along." Plaintiff testified that defendant wanted to purchase a saloon in South Omaha and have her assist him in the business and live over the saloon, which she refused to do.

Defendant and witnesses in his behalf testified in substance: Plaintiff told defendant that she wanted a divorce, that she could not live with him and did not want to ruin her life or his, which he claims affected him mentally and physically. Very shortly after the marriage the plaintiff, in playing cards with some neighbors, and on many other occasions, stated that she did not intend to live with the defendant, and that when all of her debts were paid she intended to leave. Plaintiff did not bring her furniture to Omaha; most of it had been stored, except what she sold,

receiving therefor about $75, and she stated that she was able to start operation of her boarding and rooming house any time. She sought the services of a schoolteacher, with whom she had played cards and gone riding, to follow her husband, the teacher refusing. She advertised for, but did not employ, a detective for such purpose. She complained that defendant failed to provide for her adequate and proper food, when, in fact, she had been furnished ample food and milk, according to defendant's witnesses. All of the evidence of each party is vigorously denied by the other.

The trial court granted a decree of divorce to the defendant upon his cross-petition, finding that plaintiff should pay her own witness fees, and that the defendant should pay the costs and an attorney's fee fixed at $100. Plaintiff appealed.

Nebraska cases hold generally that the trial court is vested with sound discretion in determining whether a divorce from bed and board or an absolute divorce shall be granted, and in a majority of the cases an absolute divorce is to be preferred, depending upon the facts and circumstances of each case. See *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22; *Sutherland v. Sutherland*, 132 Neb. 558, 272 N. W. 549; *McKnight v. McKnight*, 5 Neb. (Unof.) 260, 98 N. W. 62.

The instant case is one of that class of cases in which an opportunity to both hear and see the witnesses as they testify places the trial court in a much better position to know the weight and credibility that should be given to the testimony than a reviewing court can possibly be from reading a transcript thereof. This court tries this case *de novo*, and yet we have said that, where the testimony of witnesses upon the vital questions involved is conflicting, this court will consider the fact that an experienced trial judge observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. In the instant case, we think the trial court had a very definite advantage over the members of this court by observing the

witnesses and their manner of testifying and determining the truthfulness or untruthfulness of the stories as told by them. See *Clough v. Clough*, 132 Neb. 748, 273 N. W. 31; *Sutherland v. Sutherland, supra.*

Plaintiff further testified that at the time defendant proposed marriage to her he represented that each would dispose of his or her property, and that he would build her a home in Omaha, Denver, or California. There is some evidence that he represented to her that he had considerably more property than he actually owned. For instance, it is contended that he had owned a farm which he had sold for $15,000 to $17,000, and that he had told the plaintiff he had $5,000 in bonds. He did own 160 acres of farm land in Cass county, with a 15,000-dollar mortgage upon it, which farm he sold to his brother 12 years previously, and what he actually received for his equity, if any, is rather vague. The evidence discloses that his property consisted of a note for $330, given by the husband of plaintiff's cousin, which is apparently uncollectible; a note for $2,200, given in 1912 by his brother-in-law and sister, on which no interest had been paid for seven or eight years; $500 in the Murray State Bank; $100 in a South Omaha bank, and a 1936 Dodge coupé; also 80 acres of unimproved land in Perkins county, and he was indebted to one Ed Cecetka in the sum of $600.

The defendant's home in Plattsmouth was sold in November, 1936, a trifle over a year prior to his marriage to the plaintiff, to defendant's brother for $4,500, the brother at intervals paying $2,000 cash and giving a 2,500-dollar mortgage. There was a defect in the title, which had to be corrected before the defendant could give good and sufficient title. The 2,500-dollar mortgage was made in the name of both plaintiff and defendant. Plaintiff's testimony in this respect follows: "Q. What were the circumstances of that mortgage being made to both you and Mr. Hild? A. Well there was a delay in fixing the title. It wasn't just right or something and it was delayed. It took quite a little time to make out the papers. I asked him to have

it made in our names. My name as well as his." On cross-examination she testified: "Q. And before you would sign the deed for the transfer of the property, you had the mortgage made out to you, didn't you? A. To both of us, yes." The trial court quieted title of this mortgage in the defendant, and plaintiff's contention is that the court, by so doing, deprived her of her own property, and she bases this contention further upon the proposition that before the marriage defendant agreed to sell the property and build a home for both of them in Omaha, Denver, or California. However, there is also evidence that both of them were to sell their residences for such purpose. He had sold his property previously; she had not sold hers. While plaintiff does not state that she relies upon an interest in the mortgage as a gift from defendant, she indicates, however, such contention by her brief filed herein.

One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory. As previously stated, in the instant case the defendant had disposed of his real estate in Plattsmouth prior to his marriage to plaintiff. She requested the 2,500-dollar mortgage to be made out to both of them before she would sign the deed conveying the title. The evidence does not disclose that the defendant intended to make a gift of an interest in this mortgage to the plaintiff.

The trial court analyzed this evidence and concluded that the property was property in common, to be considered in determining the property rights of the parties, and concluded that the evidence did not show that defendant intended to part with this property so that plaintiff might acquire a half interest therein. The trial court was within its rights in treating the mortgage as common property. While the theory of a gift has been presented and counsel has assumed that the transfer of the legal title might be sufficient to effectuate a gift, still the person asserting it must prove all the essential elements by clear, direct, posi-

tive, express and unambiguous evidence. The evidence of the plaintiff fails in this respect.

The property of the plaintiff, at the time of the marriage, consisted of a half interest in a rooming house in Oklahoma City, value $3,500, paying her $20 a month, half of the rent, as her interest while she lived with defendant; her household furnishings, most of which are in Oklahoma City, and 160 acres of land in Kansas, from which she has received very little, if any, revenue. This marriage lasted for 11 months, and it was consummated between two people, past middle age, both with previous marital experience. Both had raised families, each owning about the same amount of property as the other. It is obvious that they could not live together as man and wife; in fact, the plaintiff was desirous of obtaining a divorce, and the record contains many statements by her to that effect. Defendant's property was accumulated by him before this marriage, and there was no joint effort by plaintiff and defendant in accumulating property. His income is primarily derived from interest that he might receive from the 2,500-dollar mortgage. He is not regularly employed.

In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case. See *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771.

Defendant is to pay all costs necessitated by this appeal. For the reasons given herein, the judgment and decree of the district court are

AFFIRMED.

INDEX

Action.

The premature commencement of an action is not a jurisdictional matter, but is one which may be waived. *Hayman v. City of Grand Island* 873

Adverse Possession.

The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the full period of ten years. *Conkey v. Knudsen* 890

Appeal. SEE CRIMINAL LAW. DRAINS. TRIAL.

1. Courts must disregard defects in pleadings or proceedings which do not affect substantial rights of adverse party. *Ritter v. Hering* 1
2. The perfecting of an appeal by a codefendant does not confer the rights of an appellant on a defendant who has not perfected an appeal. *Heinisch v. Travelers Mutual Casualty Co* 13
3. All parties who may be affected by modification or reversal of a judgment must be made parties to an appeal. *Heinisch v. Travelers Mutual Casualty Co* 13
   Kansas City Life Ins. Co. v. Neverve 630
4. A verdict for damages so large as not to find support in the evidence will be set aside. *Rich v. Dugan* 63
5. A nonprejudicial error is not ground for reversal. *Rich v. Dugan* 63
6. An order granting a new trial will not be scrutinized as closely as one ending the litigation. *Nesmith v. Clarke* 117
7. An order granting a new trial will not be disturbed on appeal unless there was no tenable ground therefor. *Nesmith v. Clarke* 117
8. In a law action tried to the court, the court's findings have the same effect as a verdict. *Bank of Roca v. Meyer* 128
   Linch v. Berggren 530
9. In a case tried to the court, the presumption obtains that the court considered only competent and relevant evidence. *Bank of Roca v. Meyer* 128
10. The brief of appellant must set out particularly each error relied on. *Labs v. Farmers State Bank* 130
11. Statutes limiting time of appeal are jurisdictional and

mandatory, and hence a trial court may not extend the time so limited. *Independent Lubricating Co. v. Good* 171
12. The statute pertaining to revivors and providing that revivors may be had within a period of one year is inoperative to modify the appeal statute. *Independent Lubricating Co. v. Good* 171
13. Where defendant's motion for directed verdict should have been sustained, error in assessment of damages is without prejudice. *Shramek v. Huff* 178
14. On trial *de novo* of an equity suit, the supreme court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Lamb v. Sandall* 300
Beskas v. Calkins 323
15. The verdict of a jury in law action based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Laux v. Batterman* 386
Dederman v. Summers 453
Thomas v. Fundum 728
16. An issue which was not raised in the district court by the pleadings and proof cannot be raised in the supreme court. *Horbach v. Butler* 394
17. Interlocutory orders made in probate proceedings, such as order allowing fees and orders of partial distribution, are not appealable. *In re Estate of Lehman* 592
18. In absence of a bill of exceptions, a ruling on a motion, based on evidence, will be presumed to be supported thereby. *Chilen v. Commercial Casualty Ins. Co* 619
19. In reviewing a directed verdict for defendant, the appellate court will assume existence of all material facts which plaintiff's evidence establishes or tends to prove and give plaintiff the benefit of proper inferences from such facts. *In re Estate of Skade* 712
20. Where a jury rendered a general verdict, the receiving of it without special findings on immaterial questions submitted was not prejudicially erroneous. *Farmers & Bankers Life Ins. Co. v. Mathers* 757
21. In absence of bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if they fairly support it. *Equitable Life Assurance Society v. Person* 800

Assignments.

1. Ordinarily, a check is not an assignment *pro tanto* of the fund in the drawee bank. *State, ex rel. Sorensen, v. South Omaha State Bank* 478

2. A check which has not been presented and accepted will operate as an equitable assignment of a deposit in a bank on which it is drawn, only if accompanied by special facts establishing it as such. *State, ex rel. Sorensen, v. South Omaha State Bank* 478

Attachment.

1. To authorize attachment, at least one of the grounds for attachment must exist. *Federal Farm Mtg. Corporation v. Mulder* 133
2. Mere insolvency of debtor is not ground for attachment. *Federal Farm Mtg. Corporation v. Mulder* 133
3. Mere proof that a farmer debtor is harvesting and marketing his crop in the usual manner is not sufficient to prove an intent to defraud his creditors. *Federal Farm Mtg. Corporation v. Mulder* 133

Attorney and Client.

1. An attorney may have a lien upon the claim of his client in an action for personal injury. *Heinisch v. Travelers Mutual Casualty Co* 13
2. After an attorney's lien has attached, the party adverse to his client cannot, with knowledge thereof, destroy it by a voluntary settlement made without the attorney's knowledge without rendering himself liable. *Heinisch v. Travelers Mutual Casualty Co* 13
3. Where it appears that two judgments arising out of the same transaction have been obtained by each of two parties against the other, equity will subordinate an attorney's lien to the right of set-off. *Dalton State Bank v. Eckert* 500

Automobiles.

1. In an action for negligence, where the evidence establishes that plaintiff was guilty of more than slight negligence, the court should direct a verdict for defendant. *Ritter v. Hering* 1
2. Title to an automobile can be transferred between living persons only by compliance with statute. *In re Estate of Nielsen* 110
3. A fee of only 75 cents is required for renewal of license from applicants holding a motor vehicle operator's license on September 1, 1937. *Cross v. Theobald* 199
4. In action for injuries in automobile collision, physical facts proved did not demonstrate that verdict for plaintiff was clearly wrong. *Dederman v. Summers* 453
5. To constitute "reckless operation" of a motor vehicle

within the meaning of the "guest" statute of Iowa, the proof must justify a finding that the operator was proceeding without heed of or concern for consequences. *Barnard v. Heather* 513

6. In an action for reckless operation of a motor vehicle, evidence *held* insufficient to warrant submission of the cause to the jury. *Barnard v. Heather* 513
7. On appeal from an order of the railway commission which is administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable. *Effenberger v. Marconnit* 558
8. A certificate of convenience and necessity issued by the railway commission is in the nature of a permit or license, personal in its nature, and is not property. *Effenberger v. Marconnit* 558
9. The requirement of a certificate of convenience and necessity before one may operate a bus line is purely a regulatory measure under control of the railway commission. *Effenberger v. Marconnit* 558
10. The railway commission has the sole power to grant, deny, amend, transfer or revoke a certificate of convenience and necessity for the operation of a bus line. *Marconnit v. Effenberger* 564
11. The powers of the district courts of this state over certificates of convenience and necessity issued by the railway commission are limited to the enforcement of the orders of the commission. *Marconnit v. Effenberger* 564
12. In an action for injuries, plaintiff was not guilty of such contributory negligence as would bar a recovery as a matter of law. *Thomas v. Fundum* 728
13. If injury is caused through the combined negligence of two motorists, cause of action against them is joint and several, and recovery may be had against either or both. *Mason v. Reynolds* 773

Banks and Banking.

1. The department of banking as receiver had power to sue stockholders on a contract guaranteeing payment of creditors of the bank. *Department of Banking v. Flotree* 416
2. An order fixing time for filing petition in intervention by a claimant whose claim has been classified as invalid by the receiver of an insolvent bank is not a judgment. *State, ex rel. Sorensen, v. South Omaha State Bank* 478

3. Bank *held* not trustee of insurance fund. *State, ex rel. Sorensen, v. South Omaha State Bank* 478
4. Where, after drawee paid a draft, drawee notified forwarding bank that bill of lading attached to draft was a forgery and requested bank not to pay proceeds of draft to drawer, forwarding bank was liable to drawee for amount of draft. *Globe Indemnity Co. v. Thayer County Bank* 484

Bills and Notes.

1. A transferee of unmatured negotiable paper procured from the maker by fraud is not a *bona fide* purchaser, if he has knowledge of circumstances showing he took the paper in bad faith. *Western Union Life Ins. Co. v. Mayhew* 6
2. Bad faith in the purchase of unmatured negotiable paper may be shown by circumstances. *Western Union Life Ins. Co. v. Mayhew* 6
3. No person is liable on a negotiable promissory note whose signature does not appear thereon. *Plum v. Siekmann* 101
4. A check must be presented for payment within a reasonable time after issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. *Millett v. Miller* 123
5. An ordinary check is not for circulation as a medium of exchange, but must be presented for payment within such reasonable time as is consistent with the circumstances of the case and the usual method of business transaction. *Millett v. Miller* 123
6. One retaining check for six days without presenting or returning it, though ample opportunity existed for doing either, will be deemed to have accepted it as payment of the debt for which it was tendered. *Millett v. Miller* 123
7. The payee in a note payable on demand after date with interest may bring an action thereon the day after the note is executed and delivered. *Luikart v. Hoganson* .... 280 *Melville Lumber Co. v. Scott* 379
8. By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations. *Melville Lumber Co. v. Scott* 379
9. In an action by maker to recover from payee amount paid to assignee of note in excess of amount received from payee, evidence *held* to sustain judgment for plaintiff. *Laux v. Batterman* 386

10. To constitute one an accommodation maker of a note, the transaction must be primarily for the benefit of the payee, and without benefit to the accommodation maker. *First Trust Co. v. Anderson* 397
11. An accommodation maker of a promissory note is not liable to the party accommodated. *First Trust Co. v. Anderson* 397

Bridges.

The county bridge act authorizes a border county to purchase a bridge which is already built. *Hansen v. Dakota County* 582

Carriers.

1. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in transportation of passengers within the state. *Marconnit v. Effenberger* 564
2. The railway commission has power to regulate rates and services of, and to exercise general control over, all railroads engaged in transportation of freight or passengers within the state. *Farmers Union Livestock Commission v. Union P. R. Co* 689
3. Rates and charges established by the railway commission have the effect of a legislative enactment until altered or set aside. *Farmers Union Livestock Commission v. Union P. R. Co* 689
4. Where the state railway commission specifically adopts the rates and charges fixed by the interstate commerce commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside. *Farmers Union Livestock Commission v. Union P. R. Co* 689
5. The statute relating to reparation by carriers for unjust rates does not authorize the railway commission to condemn retroactively as unlawful a rate or charge previously established as lawful by it, and to subject a carrier which has conformed thereto to payment of reparations. *Farmers Union Livestock Commission v. Union P. R. Co* 689

Commerce.

1. An excise tax may be imposed on the use and distribution of motor vehicle fuels without violating the commerce clause of the federal Constitution. *State v. Smith* 423
2. A state cannot impose a tax on interstate commerce. *State v. Smith* 423

3. Where the interstate commerce commission finds disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce and determines what are reasonable rates for interstate traffic and directs removal of the discrimination, the carrier is entitled to put in force the interstate rates found reasonable and to remove the forbidden discrimination by bringing the intrastate rates to the same level. *Farmers Union Livestock Commission v. Union P. R. Co.* 689

Constitutional Law.

1. The statute punishing the issuing of an insufficient funds check *held* constitutional. *White v. State* 154
2. The constitutional guaranties of the Bill of Rights contemplate that every person legally possesses the right of acquiring title to every species of property recognized by law with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State, ex rel. English, v. Ruback* 335
3. A statute will not be declared unconstitutional unless necessary to proper disposition of pending case. *State v. Smith* 423
4. A retroactive statute authorizing reparation by carriers for unjust rates is inhibited by the due process clauses of the state and federal Constitutions. *Farmers Union Livestock Commission v. Union P. R. Co.* 689
5. The supreme court must be presented with a case where issues and evidence would support a conviction for violation of a statute, if valid, before the court can rule on the question as to whether the statute invades constitutional rights. *Dutiel v. State* 811
6. The right acquired by a valid appropriation of water for irrigation is a vested property right which cannot be curtailed by subsequent legislation so long as water is used by the appropriator for a useful and beneficial purpose. *Enterprise Irrigation District v. Willis* 827
7. A statute limiting appropriation of water for irrigation has no application to valid appropriation which vested prior to its enactment. *Enterprise Irrigation District v. Willis* 827

Contracts.

1. In an action on a construction contract to recover for extra work, evidence *held* to sustain the judgment of the

trial court. *Condon Co. v. Loup River Public Power District* 284
2. It is not every breach of a contract that entitles the other party to rescind; a breach which goes only to a part of the consideration and may be compensated in damages does not warrant rescission. *Klapka v. Shrauger* 354
3. Rescission or cancelation for a mere breach of contract, not so fundamental as to defeat the object of the parties in making the agreement, will not be granted. *Klapka v. Shrauger* 354
4. Where plaintiff breached his contract with defendant, defendant could cancel the contract without liability for damages. *Zelen v. Domestic Industries* 456
5. An alleged contract for the sale of refrigerators which did not obligate the buyer to purchase them was void. *Zelen v. Domestic Industries* 456
6. In determining the meaning of an ambiguous contract, the construction given it by the parties will ordinarily be adopted by the courts. *Dunn v. Mutual Benefit Health & Accident Ass'n* 506
7. The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract. *In re Estate of Skade* 712
8. Where a contract is clear, certain, and distinct, it cannot be modified by proof of usage. *James Poultry Co. v. City of Nebraska City* 787
9. The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for cancelation of instrument, unless the person against whom relief is sought misrepresented the facts. *Meyer v. Schmidt* 850
10. "Undue influence" defined. *Meyer v. Schmidt* 850

Corporations.

1. A civil suit to enforce liability of stockholders for failure of corporation to publish notice of its debts is in its nature an action to recover a penalty for nonperformance of a statutory duty. *Hoffman v. Geiger* 349
2. A stockholder who is a creditor of the corporation cannot maintain an action against the other stockholders to recover penalties for failure to publish notice of corporate debts, where his own liability for failure to publish such notice is the same as that of other stockholders. *Hoffman v. Geiger* 349
3. The word "exhausted," as used in the statute imposing

penalties for failure to publish notice of corporate debts, refers to assets of the corporation, and does not necessarily mean, in addition, the exhausting of the entire proceeds of the sale of the assets and also application thereof to corporate debts. *Hoffman v. Geiger* 349

4. In suit to foreclose mortgage, two bankrupt corporate trustees were properly treated as a single corporation, where one owned all stock and kept all records of both, and officers, place of business, and nature of transactions were identical. *First Trust Co. v. Maryott* 679

Costs.

Taxing of costs is within the discretion of the trial court and is not reviewable unless an abuse of discretion is shown. *In re Estate of Nielsen* 110

Courts.

1. A party invoking jurisdiction of a court where the court has jurisdiction of the subject-matter is estopped to object thereto afterward. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
2. The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction. *Gate City Co. v. Douglas County* 531
3. County courts have equity jurisdiction incidental to powers properly conferred by statute. *In re Estate of Jensen* 602
4. The county court of a county having a population of less than 50,000 has jurisdiction to hear and determine a complaint against a child for delinquency, though a district court judge may be in the county at the time. *Henderson v. Gettman* 613

Creditors' Suit.

1. Whenever, on trial of a creditor's suit, it appears that plaintiff has a remedy at law, the equitable proceedings should be dismissed. *Mills v. Heckendorn* 294
2. Petition *held* to be a petition in equity in the nature of a creditor's bill. *Mills v. Heckendorn* 294
3. Before one having a general claim against another can maintain a creditor's suit to enforce the claim, he must have reduced it to judgment. *Mills v. Heckendorn* 294

Criminal Law.

1. An error proceeding in a criminal case does not suspend the sentence, but merely stays its execution. *State, ex rel. Hunter, v. Jurgensen* 136

2. After verdict of guilty and sentence by trial court, presumption of innocence ceases, and the law then presumes that the proceedings were regular and the conviction just. *State, ex rel. Hunter, v. Jurgensen* 136
3. In a prosecution for issuing a no funds check, evidence of like transactions is admissible for the purpose of showing guilty knowledge and intent. *White v. State* 154
4. In a prosecution for forgery, failure to instruct on defense of alibi is not reversible error, in absence of request to so charge. *Hall v. State* 188
5. Section 3 of the unfair practices act (Laws 1937, ch. 137), making it unlawful to sell merchandise below cost, including penalties provided for a violation thereof, *held* unconstitutional. *State, ex rel. English, v. Ruback* 335
6. The supreme court will not interfere with a conviction based on conflicting evidence unless it is insufficient as a matter of law. *Haines v. State* 433
7. Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent. *Haines v. State* 433
8. Sentence for giving no fund check *held* excessive. *Haines v. State* 433
9. The habitual criminal law does not set out a distinct crime, but provides that repetition of criminal conduct aggravates the guilt and justifies heavier penalties. *Kuwitzky v. O'Grady* 466
10. Habitual criminality is a state rather than a crime, and warrants greater punishment because of past conduct. *Kuwitzky v. O'Grady* 466
11. A verdict unsupported by evidence will be set aside. *Prichard v. State* 522
12. Where the trial court strikes testimony from the record during trial, directs the jury to disregard it, and instructs that it cannot be considered, its admission is not reversible error, in absence of showing of prejudice. *Jurgensen v. State* 537
13. In a prosecution for embezzelment, evidence *held* sufficient to prove venue in county where defendant was tried. *Jurgensen v. State* 537
14. Harmless error is not ground for reversal of a conviction. *Jurgensen v. State* 537
15. Embezzlement is a felony which may be defined in an

instruction in language equivalent to the language of the statute. *Jurgensen v. State* 537
16. All instructions given should be considered in determining whether a particular instruction is prejudicially erroneous. *Jurgensen v. State* 537
17. Where the trial court has instructed generally as to the issues in a criminal prosecution, error cannot be predicated on failure to instruct as to a particular phase of the case, in absence of a request therefor. *Jurgensen v. State* 537
18. One who escapes and remains away from prison during the period of his sentence is not entitled to have the time he was absent deducted from the term of his original sentence. *Goodman v. O'Grady* 612
19. All public offenses are statutory and no act is criminal unless the legislature has in express terms declared it to be so. *Dutiel v. State* 811

Damages.
1. Verdict for assault *held* excessive. *Rich v. Dugan* 63
2. A physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages. *Rasmussen v. Benson* 232
3. Damages for actual injury resulting from fright and shock are recoverable, though not accompanied by contemporaneous injury. *Rasmussen v. Benson* 232
4. Damages *held* excessive and remittitur ordered. *Denison v. Omaha & C. B. Street R. Co* 307

Deeds.
1. A grantor cannot, after delivery, invalidate or alter a deed. *Langan v. Langan* 229
2. The words "blooded heirs" in a deed were words of limitation and not words of purchase, the limitation was void, and the named grantee took an estate in fee simple. *Langan v. Langan* 229

Divorce.
1. Where defendant in divorce action prays for divorce, the court will determine from the evidence which party, if either, is entitled to divorce. *Tway v. Tway* 266
2. Factors in determining amount of alimony stated. *Tway v. Tway* 266
3. Whether a divorce from bed and board or an absolute divorce shall be granted rests in the court's discretion; an absolute divorce, with permanent alimony, being preferable. *Phillips v. Phillips* 313

4. Though a wife's petition for maintenance is denied and an absolute divorce granted the husband, the wife may be granted reasonable alimony. *Phillips v. Phillips* 313
5. In fixing the amount of alimony, the court will consider the estate of each party at time of marriage, their respective contributions since marriage, duration of marriage, and conduct of the parties. *Phillips v. Phillips* 313
6. In fixing amount of alimony, the court may consider all pertinent facts and circumstances. *Phillips v. Phillips* 313
7. In awarding custody of a child of tender years, the law looks to the welfare of the child. *Carlson v. Carlson* 569
8. Award of custody of minor child to the mother approved. *Carlson v. Carlson* 569
9. A hearing on an application to revise and alter an alimony decree is not a retrial of the original case nor a review of the original decree, but the court considers new or changed conditions of the parties and adapts the decree thereto. *McIlwain v. McIlwain* 705
10. On application to revise and alter an alimony decree, the court may consider remarriage as a change of circumstances that may be considered with other changes of circumstances. *McIlwain v. McIlwain* 705
11. Remarriage does not relieve a husband from obligations fixed by an alimony decree. *McIlwain v. McIlwain* 705
12. Where a divorced husband remarries, the court will make such adjustment of finances as the relative necessities of the parties demand and the ability of the husband warrants, giving the first wife first consideration. *McIlwain v. McIlwain* 705
13. An application to change a decree for alimony at a subsequent term must be founded on facts arising subsequently to the decree. *Graham v. Graham* 761
14. Where a decree is rendered against the husband for alimony in a definite sum, in full of all claims on him by reason of the marriage, courts cannot vacate or modify the decree after the term solely because of a change in circumstances of either party. *Graham v. Graham* 761
15. A decree for alimony made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in absence of statutory authority or reservation of power in the decree. *Graham v. Graham* 761

16. Authority to grant a divorce carries with it authority to adjust rights of the parties to personalty within the court's jurisdiction. *Graham v. Graham* 761
17. Whether a divorce from bed and board or an absolute divorce shall be granted rests in the court's discretion. *Hild v. Hild* 896
18. The court will consider all pertinent facts and circumstances in determining whether to grant permanent alimony. *Hild v. Hild* 896

Drains.

Appeal will not lie from assessment of benefits by county board in creation of a drainage district, the remedy being by proceedings in error. *Loup River Public Power District v. Platte County* 21

Elections.

1. On appeal to district court in an election contest the trial is *de novo*. *Swan v. Bowker* 405
2. In an election contest case, amendments allowed in district court *held* not to exceed in scope the amendment sought in county court. *Swan v. Bowker* 405
3. A student who resides at the seat of a university may vote there if otherwise qualified. *Swan v. Bowker* 405
4. The requirements of the Australian ballot law that signatures of two judges of an election shall be written on the back of each ballot to be used and that a ballot not so indorsed shall be void are mandatory. *Swan v. Bowker* 405
5. The proceeding for contesting an election under statute is a summary proceeding of a political nature in which the terms of the statute are controlling as to all rights claimed thereunder. *Swan v. Bowker* 405
6. The principles of procedure in election contests must be in harmony with the provisions of our Civil Code relating to proceedings under special statutes, provided the practice adopted must be consistent with the specific provisions of the special act under consideration. *Swan v. Bowker* 405
7. Where an election contest did not stand for trial until May 21, or four days after the May term of the county court had closed, contestee was not in default in failing to file his answer during the May term of court. *Swan v. Bowker* 405
8. A county court in an election contest has complete power of amendments of pleadings. *Swan v. Bowker* 405

Embezzlement.

1. In a prosecution for embezzlement, intent to defraud may be proved by circumstances, including methods of business and transactions of defendant in perpetrating the fraud and similar transactions with others at or near the time of the felonious act charged. *Jurgensen v. State* 537
2. The managing officer of a corporation by operating through it in committing embezzlement does not thereby secure personal immunity from the statutory penalty therefor. *Jurgensen v. State* 537
3. Where a principal entrusts property to his agent for a particular purpose and the agent embezzles it, a subsequent offer or agreement to make restitution does not defeat a prosecution for the embezzlement. *Jurgensen v. State* 537
4. A principal's money received and fraudulently appropriated by his agent to his own use in violation of the embezzlement statute includes money which shall have come into the agent's possession or care in any manner whatsoever. *Jurgensen v. State* 537

Eminent Domain.

1. The words "or damaged" in section 21, art. I of the Constitution, include all damages arising from exercise of the right of eminent domain which cause diminution in value of private property. *James Poultry Co. v. City of Nebraska City* 787
2. In determining the amount of damages because of construction of a viaduct, the jury may consider diversion of travel, inconvenience of access and diminution of business, not as independent items of damage, but for the purpose of determining market value of a leasehold immediately before and after construction of the viaduct. *James Poultry Co. v. City of Nebraska City* 787
3. Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of the property immediately before and after completion of the improvement from which injury results. *James Poultry Co. v. City of Nebraska City* 787
4. Whatever reduces the market value of property taken for a public use may be considered in determining amount of damages. *James Poultry Co. v. City of Nebraska City* 787
5. In condemnation proceedings, evidence of business trans-

acted on a leasehold may be shown, not as an independent item of damage, but as it affects market value of the leasehold. *James Poultry Co. v. City of Nebraska City* 787

6. A lease, determinable by either party on or after date of fixed term on 30 days' notice, is a lease for a definite term, and damage to the leasehold by construction of a viaduct is based on the unexpired term of the lease. *James Poultry Co. v. City of Nebraska City* 787
7. Anticipated profits from the continued carrying on of the business in an established location cannot be considered in estimating damages under eminent domain. *James Poultry Co. v. City of Nebraska City* 787
8. The only foundation for a local assessment lies in special benefits conferred by an improvement, and hence an assessment beyond special benefits conferred is a taking of private property for public use without compensation. *Hayman v. City of Grand Island* 873

Equity.

Where a person is ignorant or mistaken with respect to his legal rights or duties, and enters into a transaction, the legal scope of which he understands, equity will grant relief, defensive or affirmative, treating the mistake as analogous to a mistake of fact. *Prudential Ins. Co. v. Nuernberger* 743

Estoppel.

1. In an action by the state to recover tax on gasoline, defendants were estopped from denying that they were dealers in the distribution, sale and use of motor vehicle fuels. *State v. Smith* 423
2. "Estoppel" defined. *State v. Smith* 423
3. Whether or not the doctrine of estoppel applies depends on the facts of each case. *State v. Smith* 423
4. Where one of two innocent persons must suffer loss, the one at fault should bear such loss. *Federal Land Bank v. Worley* 493
5. Where one of two innocent parties to a transaction must suffer a loss through misconduct or fraud of a third person, the burden will fall on the one who made the loss possible. *First Trust Co. v. Maryott* 679

Evidence.

1. Parol evidence is admissible to show the true consideration of a written contract. *Barth v. Reber* 25
2. A contractual statement in a written instrument as to

the consideration cannot be varied by parol evidence. *In re Estate of Weitzel* 43
3. Evidence of a contemporaneous oral agreement is not admissible to vary terms of a written contract which is complete and unambiguous. *In re Estate of Weitzel* 43
4. A deed, in so far as it is deemed to be contractual, is subject to the parol evidence rule. *In re Estate of Weitzel* 43
5. The use of moving pictures to prove certain facts before the jury should be left largely to the trial court's discretion. *Denison v. Omaha & C. B. Street R. Co.* 307
6. Expressions of present existing pain and of its locality are exceptions to the general rule excluding hearsay evidence. *Turpin v. State* 389
7. A physician who has examined an injured person for the purpose of qualifying himself to testify at a trial may testify to statements of injured person during examination as to subjective symptoms, to show upon what information the physician based his opinion. *Turpin v. State* 389
8. It is not error to submit oral testimony to the jury to show the purpose for which a note was executed, where such note is sued on by the payee. *First Trust Co. v. Anderson* 397
9. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *Welsh v. Platte Valley Public Power and Irrigation District* 441
10. Parol evidence is inadmissible to vary terms of a written contract which is unambiguous and complete in itself. *Zelen v. Domestic Industries* 456
Dunn v. Mutual Benefit Health & Accident Ass'n 506
11. Trier of facts, being judge of credibility of witnesses, may give greater weight to testimony of one witness than to testimony of a greater number of witnesses. *Linch v. Berggren* 530
12. Testimony of witness given at former trial was properly admitted where witness was absent from state. *Wolski v. National Life & Accident Ins. Co.* 643
13. Admission of agent may be received in evidence against principal where agent, in making admission, was acting within scope of authority, and transaction to which admission relates was pending at the time. *Wert v. Equitable Life Assurance Society* 654
14. Declaration of agent, not within scope of authority

nor in course of negotiations to which it refers, is inadmissible against principal, unless made under such circumstances that principal's silence made admission his own, or unless principal ratified it. *Wert v. Equitable Life Assurance Society* 654

15. Agent's admission to be admissible against principal must have been made in discharge of agent's duty, must have been based on agent's knowledge, and must be a statement of fact, rather than an expression of opinion. *Wert v. Equitable Life Assurance Society* 654
16. In condemnation proceedings, witnesses acquainted with volume and nature of lessee's business were competent to testify to value of leasehold. *James Poultry Co. v. City of Nebraska City* 787

Execution.

A sale of realty conducted substantially as prescribed by notice and in accordance with the decree will be sustained. *Holferty v. Wortman* 732

Executors and Administrators.

1. The statute vesting the county court with jurisdiction to call before it persons who may have embezzled or concealed property of a deceased person, and to examine such persons, under oath, as to such property, is a mere discovery statute, vesting the county court with no jurisdiction beyond that of discovery. *In re Estate of Bloedorn* 261
2. One dealing in good faith with an administrator of an estate or trustee appointed by a court or attorney at law in good standing may reasonably infer that the fiduciary is acting in a representative capacity in the performance of duty, in absence of knowledge to the contrary or of circumstances indicating fraud. *Federal Land Bank v. Worley* 493
3. The statute requiring notice by publication of administration accounts contemplates final accounts. *In re Estate of Lehman* 592
4. The statute fixes the schedule of fees for personal representatives and provides for allowance of fees for extraordinary services. *In re Estate of Lehman* 592
5. The statute providing for administration of estates contemplates appeals from decrees assigning the estate and directing distribution thereof. *In re Estate of Lehman* 592
6. In a suit to set aside an order directing distribution

of an estate for fraud, evidence *held* insufficient to sustain allegations of fraud. *In re Estate of Jensen* 602

False Pretenses.

1. Intent to defraud is an essential element of the offense of obtaining money by false pretenses. *White v. State* 154
2. The no funds check statute states a complete offense. *White v. State* 154
3. Intent to defraud may be proved by the circumstances surrounding the transaction. *White v. State* 154
   Haines v. State 433
4. The offense of obtaining money by means of an insufficient fund check was completed at time check was uttered and passed, and the fact that defendant subsequently made some degree of restitution did not affect the question of his guilt. *Haines v. State* 433
5. Under the statute making the giving of an insufficient fund check a crime, it is immaterial whether restitution is made. *Haines v. State* 433

Fraud.

1. In an action for fraud in sale of a note, direction of verdict for defendants was affirmed. *Labs v. Farmers State Bank* 130
2. Fraud cannot be deduced or inferred from that which the law pronounces honest. *Meyer v. Schmidt* 850

Garnishment.

1. In garnishment in aid of execution, only the answer and evidence of garnishee are admissible in response to the summons. *Orchard & Wilhelm Co. v. North* 39
2. When the garnishee's answer is such as to give the court jurisdiction over a fund, the court should direct the garnishee to pay the fund into court and, if there be a claimant other than the judgment creditor, enter an order impleading the claimant, require framing of issues, and determine the rights of parties upon evidence. *Orchard & Wilhelm Co. v. North* 39
3. When a court directs an officer to pay to person entitled thereto money in his custody, the money is subject to garnishment. *Orchard & Wilhelm Co. v. North* 39

Gifts.

What constitutes a valid gift *inter vivos* stated. *In re Estate of Nielsen* 110

Guaranty.

1. Instrument in suit *held* to be a guaranty of payment

of bank's creditors in definite amounts at a time certain. *Department of Banking v. Flotree* 416
2. Defense that contract in suit guaranteeing payment of bank's creditors was not effective because not signed by all creditors of the bank *held* waived. *Department of Banking v. Flotree* 416

Habeas Corpus.
1. Where there was substantial conflict in evidence in proceedings in habeas corpus as to petitioner's presence in or absence from the demanding state at time offense was allegedly committed, the petitioner was not entitled to his freedom on that issue. *Bonner v. Pszanowski* 196
2. In habeas corpus proceeding against warden of state penitentiary, the return to the writ is *prima facie* evidence of cause of detention. *Goodman v. O'Grady* 612
3. Where uncontradicted warden's return to writ of habeas corpus set out that relator escaped and remained away from prison for a time, and evidence showed that relator's sentence was not completed, relator was entitled to no relief. *Goodman v. O'Grady* 612
4. An application for a writ of habeas corpus was the proper procedure to review a sentence under the second count of an information, where the sentence under the first count had been served in full. *Kuwitzky v. O'Grady* 466

Homestead.
1. The actual use of a dwelling as a family home is a sufficient selection under the homestead law. *In re Estate of Nielsen* 110
2. A homestead may be selected from property of the wife with her consent, which will be presumed from the use and occupancy of the property as a family home until the contrary is shown. *In re Estate of Nielsen* 110

Husband and Wife.
1. Evidence in suit for accounting by administrator of wife's estate against surviving husband *held* to sustain order of trial court affirming referee's report and dismissing plaintiff's action. *Schultz v. Bleckwehl* 94
2. Where husband and wife execute a note and mortgage on realty to secure husband's debt without inserting in those instruments any provision binding the wife's separate estate, a deficiency judgment against her in a suit to foreclose the mortgage is unauthorized. *Filley v. Mancuso* 403

Indictment and Information.

To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Dutiel v. State* 811

Infants.

Any deed of an infant is voidable only and title passes by it and remains in grantee until some clear act of disaffirmance is done by the infant after coming of age. *Klapka v. Shrauger* 354

Insane Persons.

1. Finding of incapacity authorizing appointment of a guardian will not ordinarily be disturbed on appeal. *In re Guardianship of Blochowitz* 163
2. The words "mentally incompetent," "incompetent," and "incapable," in the statute pertaining to appointment of a guardian, defined. *In re Guardianship of Blochowitz* 163
3. "Mental incompetency" is established by showing an essential privation of reasoning faculties, or incapacity of understanding and acting with discretion in the ordinary affairs of life. *In re Guardianship of Blochowitz* 163

Insurance.

1. In an action on an insurance policy, *held* that the provision for termination of policy on nonpayment of premiums by a third party could not be invoked. *Moore v. Washington National Ins. Co* 29
2. An insurer denying liability for death benefits on the ground of cancelation cannot, after the commencement of action on policy, interpose the defense that the policy terminated for nonpayment of premiums. *Moore v. Washington National Ins. Co* 29
3. The listing of a telephone in a current telephone directory in the name of an insurance company is an implied invitation to a policyholder to use the telephone for the transaction of business relating to his policy, and he may do so, though he does not recognize on the telephone the voice of the person assuming to act for insurer. *Ware v. Home Mutual Ins. Ass'n* 329
4. The holder of a policy of automobile accident insurance on his automobile may, by use of a telephone listed in a current telephone directory in the name of insurer, procure a transfer of his insurance to another auto-

mobile owned by him, if there is no increase in the risk or in the premium paid. *Ware v. Home Mutual Ins. Ass'n* 329

5. The statutory provision that an insured's breach of a condition of his insurance policy may not avail the insurer to avoid liability, unless it contributes to the loss, is by construction a part of the insurance contract. *Ware v. Home Mutual Ins. Ass'n* 329
6. Where industrial life policy contains a clause that the policy shall be incontestable after being in force for two years, except for nonpayment of premiums, or fraud, there is a similar period to contest reinstatement, beginning when reinstatement occurs. *Wolski v. National Life & Accident Ins. Co.* 643
7. Provision in application for reinstatement of an industrial life policy that insured certifies that he is in good health is a condition precedent, without which there is no liability on the policy. *Wolski v. National Life & Accident Ins. Co.* 643
8. Where industrial life insurance policies are indorsed for reinstatement, premiums in arrears accepted, and subsequent premiums collected, there is a presumption that the insured was in good health at time of reinstatement, but this presumption may be rebutted. *Wolski v. National Life & Accident Ins. Co.* 643
9. That insurer had on previous occasion accepted delinquent premiums on lapsed policy, and had reinstated it, without an application for revival, did not establish such a course of dealing or custom as would estop insurer from asserting that applicant for reinstatement was not in good health when he again sought to revive the policy. *Wolski v. National Life & Accident Ins. Co.* 643
10. Where insurer relies on a stipulation in a policy to defeat recovery, he must affirmatively plead a breach thereof as a defense. *Farmers & Bankers Life Ins. Co. v. Mathers* 757
11. Where insurer fails to set up a condition precedent contained in the policy, and fails to allege its breach, such defense is waived. *Farmers & Bankers Life Ins. Co. v. Mathers* 757
12. An insurance agent who fills in an application for life insurance and accepts false answers to questions pertaining to applicant's health, instead of applicant's truthful answers, is insurer's agent. *Farmers & Bankers Life Ins. Co. v. Mathers* 757

Intoxicating Liquors.

Where an officer seizes liquors under a search warrant, it is his duty to hold such liquors until all prosecutions arising out of seizure have been determined. *Picard v. Steinacher* 723

Judgment.

1. The granting of a perpetual injunction to prevent an irrigation district from invading the vested contract right of an irrigator to a specific quantity of water from the natural flow of a river is not a bar to an action at law for damages caused by the wrong enjoined, where damages were not pleaded nor determined in the injunction suit. *Ledingham v. Farmers Irrigation District* 276
2. A judgment notwithstanding the verdict can be rendered only where the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment. *Winterson v. Pantel Realty Co.* 472
3. Where there are two judgments, if the equities subordinate an attorney's lien to the right of set-off, it is immaterial that one may be founded on contract and the other on tort. *Dalton State Bank v. Eckert* 500
4. A petition filed more than two years after judgment was entered, seeking to set aside the judgment for fraud, which shows on its face that fraud was discovered within the two-year period, does not state a cause of action. *In re Estate of Jensen* 602
5. Where a settlement agreement between contestants and beneficiary of a will was sought to be revoked by the beneficiary, but was upheld by the court, the decree was *res judicata* of a subsequent attack on the settlement agreement. *Shea v. Shierman* 862

Landlord and Tenant.

1. While violation of a city ordinance prohibiting windows in stairways in order to prevent injury is evidence of negligence, it is not the basis of liability, where the violation was not the proximate cause of injury. *Shramek v. Huff* 173
2. Use of concrete with a smooth finish in the construction of stairway and painting the steps with ordinary paint and use of sweeping compound containing oil while sweeping steps are not evidence of negligence rendering owner of apartment liable to tenant who fell while

descending stairway, in absence of showing that improper material was used, or that it was used in a negligent manner. *Shramek v. Huff* 178
3. A city ordinance requiring protective measures to be taken in constructing apartment houses imposes a mandatory duty, which, if not performed, is negligence *per se*. *Winterson v. Pantel Realty Co.* 472
4. The mere opinion of the parties as to the construction of a lease, not carried into effect by any action, will not amount to a practical construction. *James Poultry Co. v. City of Nebraska City* 787

Libel and Slander.

1. Actionable words imply damage, but many words which are actionable *per se* when published are not actionable when spoken, without alleging and proving special damage. *Nelson v. Rosenberg* 34
2. Words to be slanderous *per se* must not only charge an offense which is actionable, but also the nature thereof. *Nelson v. Rosenberg* 34
3. The innuendo does not add to nor enlarge the slanderous words used, but sets out the meaning intended to be conveyed by showing the application of the words. *Nelson v. Rosenberg* 34
4. The appellation "crook" will not constitute a basis for recovery of damages for slander, in absence of specific allegation of special damage. *Nelson v. Rosenberg* 34

Licenses.

1. An action for failure to pay taxes, as provided in the motor vehicle fuels act, may be brought in any county in which service of process can be had on defendant. *State v. Smith* 423
2. The tax on gasoline is an excise tax on the use and distribution of gasoline within the state. *State v. Smith* 423
3. The increase of gasoline tax one cent a gallon was not such alteration as would release the sureties under a bond requiring prompt payment of the tax on motor vehicle fuels. *State v. Smith* 423

Limitation of Actions.

1. The statute of limitations does not begin to run against a suit to restore beneficial interests in land under a resulting trust until the trustee denies the interests of the beneficiaries. *Windle v. Kelly* 143
2. A cause of action against an officer of a bank for fraudulently diverting its assets must be brought within

four years from discovery of the fraud. *Department of Banking v. Hall* 191
3. A cause of action for fraudulent diversion of bank's assets accrues as soon as the diversion is complete, in absence of concealment of the facts. *Department of Banking v. Hall* 191
4. The running of limitations is not delayed until plaintiff can procure evidence to sustain his cause of action. *Department of Banking v. Hall* 191
5. Where a note was payable on demand after date, payee's right to extend time for payment and thus bind indorsers on the note did not prevent the statute of limitations from running against their obligations as indorsers. *Luikart v. Hoganson* 280
6. Ordinarily, the statute of limitations begins to run when a cause of action accrues. *Luikart v. Hoganson* 280
Melville Lumber Co. v. Scott 379
7. A civil action to recover a statutory penalty must be commenced within a year after the cause of action accrued. *Hoffman v. Geiger* 349
8. The liability of stockholders for the penalties arising from failure to publish notice of corporate debts does not accrue until the assets of the corporation are exhausted. *Hoffman v. Geiger* 349
9. Limitations do not run against the claim of an adult child for services continuously performed under an oral contract for parents during their lives until the contract is terminated by their death. *In re Estate of Skade* 712
10. Actions for accident or mistake, not specifically mentioned in statutes of limitations, are classed with fraud, and the four-year statute of limitations is applied. *Sweley v. Fox* 780
11. The recording of a real estate mortgage will charge all parties with notice of a mistake therein, so as to start running of limitations, when accompanied by circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to discovery of the mistake. *Sweley v. Fox* 780

Master and Servant.

1. An injury, to be compensable under the workmen's compensation law, must arise out of and in the course of employment. *Sheets v. Glenwood Telephone Co* 56
McCall v. Hamilton County Farmers Telephone Ass'n 70
2. There must be a causal connection between the employment and the injury before recovery can be allowed

under the workmen's compensation law. *Sheets v. Glenwood Telephone Co.* 56
3. Where an employee deviates from her employment and is injured while engaged in her own business or enjoyment, the injury is not compensable under the workmen's compensation law. *Sheets v. Glenwood Telephone Co.* 56
4. Ordinarily, an employer is liable to a third party for assault by an employee acting within the scope of his employment. *Rich v. Dugan* 63
5. An employee's act which is incidental to his authorized duties is within the scope of his employment. *Rich v. Dugan* 63
6. In determining whether an employee's act is incidental to his authorized conduct so as to be within the scope of employment, surrounding facts and circumstances, together with nature of employment and conduct of employee, will be considered. *Rich v. Dugan* 63
7. Employer *held* liable for assault on third party by employee. *Rich v. Dugan* 63
8. A compensation claimant has the burden of establishing that he suffered injury from an accident arising out of and in the course of his employment. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
9. Compensation awards must be based on evidence showing that employee incurred disability arising out of and in the course of his employment, and not on probabilities or possibilities. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
10. Under the compensation act, a compensation case may be heard by stipulation of parties in an appeal from the compensation court by the district court for any county. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
11. Injury to a county employee while leaving the courthouse after her work was ended was an injury arising out of and in the course of her employment. *McDonald v. Richardson County* 150
12. Walking to and from the street and a building where one is employed is a necessary incident to the employment, and an injury sustained in so doing is compensable. *McDonald v. Richardson County* 150
13. "Reckless indifference to safety," as used in the workmen's compensation law, means more than want of ordinary care, and implies a rash and careless spirit, not necessarily amounting to wantonness. *Richards v. Abts* 347

14. Any competent evidence tending to show knowledge by the employee of the dangerous character of an act which subsequently caused his death should be admitted in a compensation action, where the defense is wilful negligence by the employee. *Richards v. Abts*.... 347
15. The workmen's compensation law will be liberally construed. *Ludwickson v. Central States Electric Co*..... 371
16. A workman who because of injury is unable to perform a substantial amount of labor is "totally disabled," within the workmen's compensation law. *Ludwickson v. Central States Electric Co*..... 371
17. "Total and permanent disability," within workmen's compensation law, defined. *Ludwickson v. Central States Electric Co*..... 371
18. Evidence in action for negligence *held* to sustain judgment for defendants. *Gallagher v. Law*..... 381
19. Evidence sustained finding that compensation claimant had sustained a permanent partial loss of use of hand. *Turpin v. State* 389
20. The mere fact that after employee's injury he receives as wages a larger sum in another occupation than his former remuneration does not necessarily preclude recovery of compensation under the compensation act. *Micek v. Omaha Steel Works*..... 449
21. "Daily wages," as used in compensation law, defined. *Carlson v. Condon-Kiewit Co*..... 587
22. Where the contract of hire fixes the maximum number of hours of work for a day or week, they should be considered in reducing the hourly rate to a weekly rate as the basis for an award under the compensation law. *Carlson v. Condon-Kiewit Co*..... 587
23. Under the compensation law, an employee may not recover, in addition to the amount fixed by schedule for loss of an eye, an additional amount for loss of stereoscopic vision. *Carlson v. Condon-Kiewit Co*..... 587
24. Where a reasonable controversy exists as to the amount due under the compensation law, an employer is not liable for the penalty for waiting time. *Carlson v. Condon-Kiewit Co*..... 587
25. The district court has power, on motion of plaintiff, to dismiss without prejudice an action pending before it on appeal from the workmen's compensation court. *Chilen v. Commercial Casualty Ins. Co*..... 619
26. Compensation award *held* to have the force and effect of a judgment between the parties in interest, and also

to be binding on the insurance carrier. *Chilen v. Commercial Casualty Ins. Co.* 619
27. Under the compensation law, an accidental injury to an employee is not compensable if it does not arise out of his employment or is caused by his intentional wilful negligence. *Moise v. Fruit Dispatch Co.* 684
28. It is a purpose of the compensation law to shift from employee to modern industry burdens of economic waste arising as a result of his accidental injury or death, and to prevent his dependents from becoming a public charge. *Moise v. Fruit Dispatch Co.* 684
29. The compensation law will be liberally construed. *Moise v. Fruit Dispatch Co.* 684
30. An employee's negligence while in the performance of duty, unless intentionally wilful, does not necessarily prevent compensation for his resulting injury or death. *Moise v. Fruit Dispatch Co.* 684
31. Disobedience of order by a person other than employer, directing employee not to smoke in a gas-filled room, if employee's negligence is not wilful, does not prevent compensation for resulting injury. *Moise v. Fruit Dispatch Co.* 684
32. The word "wilful," as related to negligence of employee while in performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care, not necessarily amounting to wantonness, but approximating it in degree. *Moise v. Fruit Dispatch Co.* 684
33. The lighting of a pipe by an employee in a gas-filled room, thus causing an explosion which resulted in his death, was not such negligence as would prevent recovery of compensation by widow. *Moise v. Fruit Dispatch Co.* 684
34. Whether one is an employee or an independent contractor must be determined from the facts of the particular case. *Lowe v. Chicago Lumber Co.* 735
35. Independent contractor defined. *Lowe v. Chicago Lumber Co.* 735
36. One who contracts to supply labor and supervise construction of a barn, and receives a definite amount for the work, is an independent contractor. *Lowe v. Chicago Lumber Co.* 735
37. Where one party accepts a favorable award by a single judge of the compensation court, he cannot prevent the defeated party from waiving hearing before the compensation court sitting en banc, and appealing

directly to the district court. *Eisenhauer v. Otoe County* 818
38. Claimant *held* to have failed to prove alleged injury. *Eisenhauer v. Otoe County* 818
39. Unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable where conditions of employment expose the workman to likelihood of such special risk, or where there is an immediate causal connection between the employment and the assault. *Hopper v. Koenigstein* 837
40. The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from causative acts occurring within the scope or sphere of employment, which includes all acts reasonably necessary or incident to performance of work, including matters of personal convenience and comfort not in conflict with specific instructions. *Hopper v. Koenigstein* 837
41. In determining whether a risk not constituting a direct performance of work arises out of employment, the test to be applied is whether it is reasonably incident thereto. *Hopper v. Koenigstein* 837
42. Death of an employee, who was sent to regulate a beer-cooling system in a beer tavern, and who was struck a fatal blow with the fist by a companion while they were drinking at the bar, was not compensable. *Hopper v. Koenigstein* 837
43. A transcript of pleadings and orders in a case tried before a judge of the compensation court is not required to be filed in the district court to give it jurisdiction of an appeal, where a retrial before the entire court has been waived. *Hansen v. Paxton & Vierling Iron Works* 867
44. Procedure pointed out to give the district court jurisdiction in a compensation case in which a retrial before the compensation court is waived. *Hansen v. Paxton & Vierling Iron Works* 867
45. Petition for trial *de novo* of compensation case in district court does not limit scope of hearing. *Hansen v. Paxton & Vierling Iron Works* 867
46. No præcipe or summons is required to give the district court jurisdiction of an appeal from the compensation court, where retrial in the compensation court has been waived, but the clerk of the district court is required immediately to serve a copy of the petition on

the adverse party. *Hansen v. Paxton & Vierling Iron Works* 867
47. Though motion for new trial is unnecessary in a compensation case, if such motion is filed in district court, time for perfecting appeal from district court to supreme court does not commence to run until the motion is overruled. *Hansen v. Paxton & Vierling Iron Works* 867
48. The word "requires," as used in section of compensation law granting immunity from compensation to an owner who requires his contractor to procure compensation insurance, means "compel" or "exact." *Hiestand v. Ristau* 881
49. An owner who inserts in a contract with his contractor a futile promise by the contractor to procure compensation insurance does not escape liability. *Hiestand v. Ristau* 881
50. The phrase "any scheme, artifice or device," as used in the section of the compensation law creating a joint and several liability of owner and contractor for compensable injuries to workmen, does not necessarily imply active fraud or evil design. *Hiestand v. Ristau* 881
51. Owner and contractor were liable to contractor's employees for compensable injuries, where owner failed to require contractor to procure compensation insurance. *Hiestand v. Ristau* 881
52. Provision of the compensation law that the word "employee" shall not be construed to include any person whose employment is casual, and which is not in the usual course of trade, means conjunctively both casual employment and usual course of trade. *Hiestand v. Ristau* 881
53. "Casual employment" means occasional; coming at certain times without regularity, in distinction from stated or regular. *Hiestand v. Ristau* 881
54. Employment of a carpenter by a contractor for several weeks continuously to repair farm and other buildings for the owner is not "casual;" nor is an accidental injury of the carpenter in such work noncompensable as farm labor, within the compensation law. *Hiestand v. Ristau* 881
55. Repairing of buildings on farms temporarily owned by insurance company *held* in usual course of business of company, within the compensation law. *Hiestand v. Ristau* 881
56. "Seasonal employment" defined. *Hiestand v. Ristau* 881

57. Since occupation of a carpenter may be pursued throughout the year, he is not engaged in "seasonal employment" in the sense that it is a defense to claim for workmen's compensation. *Hiestand v. Ristau* 881
58. Award of 20 per cent. for permanent partial disability in loss of use of foot *held* not excessive. *Hiestand v. Ristau* 881
59. Where there is a reasonable controversy over liability for compensation, penalties for "waiting time" are not recoverable. *Hiestand v. Ristau* 881
60. Award of compensation against contractor and owner of building approved. *Helgenberger v. Ristau* 889

Mortgages.

1. The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act taking away the court's power to enter deficiency judgment in mortgage foreclosure. *Filley v. Mancuso* 403
2. An order confirming a foreclosure sale will not be set aside for inadequacy of price, unless so low as to evidence fraud, and where the evidence does not show that a resale would produce a better price. *Weir v. Smith* 447
3. Fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith, and good faith of a subsequent encumbrancer in reliance upon the fraudulent release of the mortgage of record may be shown in the same manner. *Federal Land Bank v. Worley* 493
4. A foreclosure sale conducted inside the east front door and at the top of a short flight of stairs leading from said door of the courthouse was a substantial compliance with a notice that the sale would be held at the east front door. *Bowman v. Caldwell* 554
5. Where defendants in a foreclosure suit avail themselves of the statutory stay of execution, they are estopped from attacking the judgment. *Bowman v. Caldwell* 554
6. Inadequacy of price will not prevent confirmation of a foreclosure sale, unless the price is so low as to evidence fraud. *Home Owners' Loan Corporation v. Smith* 618
7. A trustee appointed to succeed a bankrupt trustee generally has predecessor's authority to receive payment of matured principal and interest owing on bonds secured by mortgage. *First Trust Co. v. Maryott* 679

8. A partial payment by mortgagor on matured bond secured by mortgage to trustee authorized to receive it for bondholders discharged bond and mortgage to extent of the payment, in absence of fraud or negligence of mortgagor. *First Trust Co. v. Maryott* 679
9. Entering satisfaction of a mortgage and taking a new one does not extinguish a mortgage, but is merely a renewal thereof, where designed by the parties to be a continuation of the first mortgage, and hence does not give priority to an intervening judgment or mortgage creditor of the mortgagor. *Prudential Ins. Co. v. Nuernberger* 743
10. To warrant reformation of a mortgage for mutual mistake, the proof must be clear, convincing, and satisfactory. *Sweley v. Fox* 780
11. Fairness of the price on a foreclosure sale is a question primarily for the trial court, and confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865
12. A motion to set aside a foreclosure sale for inadequacy of bid is merely an objection to confirmation, which is disposed of by the order of confirmation. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865
13. The trial court did not err in granting a writ of assistance on oral application at time of confirmation of a foreclosure sale, where the right thereto clearly existed and the parties were before the court. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865

Municipal Corporations.

1. Where a city council acting within its authority has determined on sufficient evidence that a building is a public nuisance, the courts are without authority to interfere. *Horbach v. Butler* 394
2. A city of the metropolitan class has the power to remove or to order the removal of a building which has become a nuisance because of its dangerous condition. *Horbach v. Butler* 394
3. Levies of special assessments for construction of sewers or drains within a city must be made on realty specially benefited within the improvement district to the extent of benefits to such realty. *City of Scottsbluff v. Acton* 636
4. No tax for improvement within a city can be levied on property outside the improvement district. *City of Scottsbluff v. Acton* 636

5. Where a city properly levies special assessment against realty for sewer construction, and tax sale certificates are foreclosed to collect the special and general assessments against an entire tract of land, the greater portion of which is not benefited by the special assessment, the decree is subject to collateral attack, since the proceedings are void. *City of Scottsbluff v. Acton* 636

Negligence.

1. Evidence in action for negligence *held* to show actionable negligence warranting submission of cause to jury. *Rankin v. J. L. Brandeis & Sons* 86
2. The proprietor of a store is not an insurer against accidents to customers, but must exercise reasonable care to keep the premises safe for use of customers. *Rankin v. J. L. Brandeis & Sons* 86
3. The mere fact that an invitee falls on the floor of a store does not raise a presumption of negligence of owner, but what constitutes due care of the owner is determined by the circumstances and conditions surrounding the transaction under consideration. *Rankin v. J. L. Brandeis & Sons* 86
4. A person in a position of danger may still recover for injuries received, if another knowing the situation is thereafter negligent in failing to utilize with reasonable care his then existing ability to avoid harming him. *Diehm v. Dargaczewski* 251
5. Before the doctrine of last clear chance can apply, one causing injury must have had a chance to have avoided the injury, for the doctrine presupposes time for action. *Diehm v. Dargaczewski* 251
6. "Negligence" defined. *Eaton v. Merritt* 363
7. In an action for negligence, where the evidence establishes that plaintiff was guilty of more than slight negligence, the court should direct a verdict for defendant. *Eaton v. Merritt* 363
8. "Contributory negligence" defined. *Eaton v. Merritt* 363
9. Negligence of husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the duty to direct operation of the automobile. *Dederman v. Summers* 453
10. Persons entering premises of another are in one of three classes: "Invitees" are those who are expressly or impliedly invited; "licensees" are persons whose presence is not invited, but tolerated; "trespassers" are per-

sons who are neither suffered nor invited to enter. *Haley v. Deer* 459
11. An owner's duty toward an invitee is to exercise reasonable care to keep premises in a safe condition, but a licensee takes the premises as he finds them, for the owner's only duty to a licensee is to give notice of concealed dangers. *Haley v. Deer* 459
12. A person going into a store to use a pay telephone maintained for use of customers is an invitee. *Haley v. Deer* 459
13. An invitee who fell through an unguarded and unlighted trap-door could recover damages for her injuries. *Haley v. Deer* 459
14. In a personal injury action, plaintiff has the burden to establish that some one of the acts of negligence charged in the petition was the proximate cause of the injury. *Winterson v. Pantel Realty Co* 472
15. In an action for damages from fire, in order to entitle plaintiff to recover, plaintiff must show that the defendant's negligence was the proximate cause of the fire and the consequent damages. *Watenpaugh v. L. L. Coryell & Son* 607
16. The gist of an action for damages from fire is negligence. *Watenpaugh v. L. L. Coryell & Son* 607
17. The term "negligence" is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society. *Watenpaugh v. L. L. Coryell & Son* 607
18. In an action for damages from fire which allegedly started from a stove on defendant's premises, plaintiff's evidence, which failed to show the cause of the fire, was insufficient to justify submission of the case to the jury. *Watenpaugh v. L. L. Coryell & Son* 607

New Trial.

1. In passing on motion for new trial, the court may consider conflicting and improbable evidence and all facts occurring during the trial. *Nesmith v. Clarke* 117
2. An instruction which has a tendency to mislead the jury is ground for a new trial. *Diehm v. Dargaczewski* 251
3. If a court believes that it erred in submitting a case to the jury and that it should have directed a verdict for defendant for insufficiency of plaintiff's evidence to make a case, the proper remedy is to grant a new trial. *Winterson v. Pantel Realty Co* 472
4. To obtain a new trial on the ground of newly discovered

evidence, the evidence must be such that applicant could not with reasonable diligence have discovered and produced it at the trial. *Gate City Co. v. Douglas County* 531
5. The court, during the term at which a judgment was rendered, has inherent power to set aside the judgment if obtained by fraud and to grant a new trial. *Gate City Co. v. Douglas County* 531
6. Where codefendants join in motion for new trial, errors assigned which are not good as to both defendants are not good as to either. *Thomas v. Fundum* 728

Novation.

Where a creditor accepts from his debtor any form of new agreement in place of a prior contract between them, with intent to cancel the former and substitute the new one therefor, novation by substitution of obligation takes place. *American Loan Plan v. Frazell* 718

Officers.

Where the occupant of a public office is found guilty of a felony and sentenced by a court of competent jurisdiction, he has been convicted of a felony within the meaning of that term as used in the Constitution. *State, ex rel. Hunter, v. Jurgensen* 136

Partition.

1. In a suit to partition encumbered land, a subordinate judgment lienor had the burden of proving an oral agreement alleged by it that the holders of the first judgment lien in possession were accountable to a life tenant for rents and profits. *Sutton v. Wood* 120
2. The statute gives one of several tenants in common the right to partition of their realty. *Windle v. Kelly* 143
3. The guardian of an incompetent who is a tenant in common with other owners of land in equal shares may maintain a partition suit in behalf of the ward. *Windle v. Kelly* 143
4. A petition in a partition suit by a named individual as guardian of a named incompetent is not demurrable for want of a competent plaintiff, where the petition specifically alleges that the suit is brought for and in behalf of the ward. *Windle v. Kelly* 143
5. Petition in a suit in behalf of a ward by his guardian to partition land *held* not so indefinite as to require nonsuit. *Windle v. Kelly* 143
6. Equitable owners of land in equal shares, where the

beneficial interests therein are held in trust for them under a resulting trust, are tenants in common within the meaning of the law relating to partition. *Windle v. Kelly* 143

Partnership.

A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated therefor. *Beskas v. Calkins* 323

Paupers.

1. The county board of each county is vested with exclusive superintendence of the poor in the county, with authority to employ a county physician. *Miller v. Banner County* 549
2. A person is chargeable as a poor person in the county in which he has a legal settlement. *Miller v. Banner County* 549
3. A physician, not hired by the county, cannot recover from the county for services rendered to a poor person in an emergency, where there exists a duly appointed county physician. *Miller v. Banner County* 549
4. A physician seeking recovery from a county for services rendered to a poor person is chargeable with notice of appointment of a county physician. *Miller v. Banner County* 549

Payment.

Presumption that lender of money is not indebted to borrower on previous obligation not mentioned by either at time of loan may be overthrown by evidence of pre-existing debt owing from lender to borrower. *In re Estate of Skade* 712

Pleading.

1. The essential character of the cause of action and the relief sought, as shown by the petition, determine whether it is an action at law or a suit in equity. *Mills v. Heckendorn* 294
2. The trial court has a wide discretion in permitting amendments to pleadings during and after trial. *Beskas v. Calkins* 323
3. The allowance of amendment in an appropriate case is not to be denied solely because the trial has progressed to a particular stage, but may be allowed even after the evidence is closed. *Swan v. Bowker* 405
4. A contract incorporated into a pleading as part of a

cause of action or defense controls allegations which it contradicts. *Department of Banking v. Flotree* 416

Principal and Agent.

1. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the agent's acts. *Western Union Life Ins. Co. v. Mayhew* 6
2. The burden of proof is on the party alleging agency to establish same by a preponderance of the evidence. *Schultz v. Bleckwehl* 94
3. "Agency" defined. *Schultz v. Bleckwehl* 94
4. Ratification by purported principal of transaction entered into by purported agent has the same effect on third person's liabilities to principal as an original authorization. *Millett v. Miller* 123
5. A principal may ratify what he could have authorized. *Millett v. Miller* 123
6. Ostensible authority to act as agent may arise if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, allows third persons to act on such apparent agency. *Ware v. Home Mutual Ins. Ass'n* 329

Quieting Title.

Where it appears that the owner of lands to which accretions had attached conveys part of the lands, but retains possession of the accretions, and the purchaser disclaims any interest therein, vendor may maintain suit to quiet title thereto in himself, as against those who prove no interest in or title to the accreted lands. *Conkey v. Knudsen* 890

Rape.

1. To warrant conviction of assault with intent to commit rape, the circumstances must show the intent beyond a reasonable doubt. *Prichard v. State* 522
2. Evidence *held* insufficient to sustain conviction for assault with intent to commit rape. *Prichard v. State* 522

Religious Societies.

In action under statute relating to succession to real or personal property on dissolution of religious societies, evidence was insufficient to show that plaintiff was entitled to defendant's property. *In re Application of Tyler* 667

Replevin.

Where defendants appear, answer to the merits, and

go to trial without making objections to amendable defects in an affidavit in replevin, they waive the defects. *American Loan Plan v. Frazell* 718

Sales.

In an action to replevy ice cream cabinets, defense of reliance on an implied warranty that machines were reasonably fit for the general purpose for which they were manufactured *held* not sustained by evidence. *Refrigeration Discount Corporation v. Richards* 856

Schools and School Districts.

1. Where a school district treasurer succeeds himself to that office, he changes his official personality, each term of office being a separate entity, and hence the delivery of a claim, based on a certificate of deposit in an insolvent bank, to himself as his successor is not a payment which will relieve him or the sureties on his bond from liability. *Thurston County v. Chmelka* 342
2. A school district treasurer is liable on his official bond for school funds coming into his hands which were lost by reason of the insolvency of a bank in which he had deposited them, notwithstanding he acted in good faith in the selection of such bank. *Thurston County v. Chmelka* 342

Specific Performance.

1. Specific preformance of alleged parol contract between plaintiff's mother and father, that father would leave his estate, other than portion due stepmother by law, to plaintiff, disallowed for failure of proof. *Goodwin v. Freadrich* 203
2. Equity will grant specific performance of a parol contract to will property to another, where the terms of the contract are established by evidence that is clear, convincing, and satisfactory, and the contract has been wholly performed by one party so that its nonfulfilment would amount to fraud on that party. *Craig v. Seebecker* 221
3. Evidence *held* to establish parol contract to will property, and to entitle plaintiffs to specific performance thereof. *Craig v. Seebecker* 221
4. In a suit for specific performance of a contract for sale of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money, unless the contract expressly states that

performance at or within a given time is essential, or enforcement thereof will work injustice. *Klapka v. Shrauger* 354

States.

No set-off, counterclaim or cross-demand may be pleaded in an action by the state for collection of revenue. *State v. Smith* 423

Statutes.

1. Where language of a statute is plain and unambiguous, there is no room for construction. *Cross v. Theobald* 199
2. In construing a statute, effect must be given, if possible, to its several parts. *Hansen v. Dakota County* 582
3. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act. *Hansen v. Dakota County* 582
4. When the legislative intent is in doubt, resort may be had to the title of an act as an aid to construction. *Hansen v. Dakota County* 582
5. In determining legislative intention, all provisions of statute bearing on the point in dispute should be considered. *Chilen v. Commercial Casualty Ins. Co* 619
6. All statutes *in pari materia* must be taken together and construed as if they were one law. *Chilen v. Commercial Casualty Ins. Co* 619
7. Where parts of a statute are in conflict, the last in point of time or order of arrangement prevails. *Chilen v. Commercial Casualty Ins. Co* 619

Street Railways.

1. Bonds of a street railway company, by referring to the mortgage securing them for consequences of default in payment when due, make pertinent provisions of the mortgage a part of the bonds and charge purchasers thereof with notice of such consequences. *Greenwald v. Omaha & C. B. Street R. Co* 183
2. Bonds of a street railway company are nonnegotiable, where they provide that a majority of the bondholders may waive defaults and extend time for payment and inhibit suit on the bonds and mortgage when due. *Greenwald v. Omaha & C. B. Street R. Co* 183
3. An inhibition in a street railway company's bonds preventing suit thereon and on the mortgage securing them when due, unless directed by holders of 25 per cent. of the outstanding bonds, is a reasonable and valid provision. *Greenwald v. Omaha & C. B. Street R. Co.* 183

Subrogation.

1. A surety on a fidelity bond who partially restores loss created by fraud of principal obligor cannot thus acquire by subrogation a greater right than that formerly possessed by the party for whose benefit the bond was given. *Federal Land Bank v. Worley* 493
2. The right of subrogation rests upon some recognized subject of equitable cognizance. *Federal Land Bank v. Worley* 493
3. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Equitable Life Assurance Society v. Person* 800
4. Where plaintiff's assignor, relying on defendant's agreement that loan to defendant would be secured by first mortgage, loaned money, plaintiff *held* entitled to be subrogated to rights of original mortgagee. *Equitable Life Assurance Society v. Person* 800

Taxation.

1. A state, county or city general tax on property exempt from taxation is void. *McDonald v. Masonic Temple Craft* 48
2. A tax on property exempt from taxation is one levied for an unauthorized purpose, and collection thereof may be enjoined. *McDonald v. Masonic Temple Craft* 48
3. A tax levied on property as a whole, part of which is exempt, is unauthorized and the whole tax is void. *McDonald v. Masonic Temple Craft* 48
4. A tax on an aggregate valuation of exempt and non-exempt property is void. *McDonald v. Masonic Temple Craft* 48
5. A city purchasing and foreclosing a tax sale certificate on realty does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of proceeds. *City of McCook v. Johnson* 270
6. A city in foreclosing a tax sale certificate is a trustee and the trust property is the tax sale certificate with the rights evidenced thereby. *City of McCook v. Johnson* 270
7. Where a city forecloses a tax sale certificate and purchases the realty at the sale, it must pay the amount of its bid to the sheriff. *City of McCook v. Johnson* 270
8. In the absence of statute or constitutional provision,

taxes voluntarily paid cannot be recovered back, and an original action may be brought to recover an illegal tax only by virtue of statutory or constitutional authority. *State v. Smith* 423
9. An original action lies to recover special assessments paid, where levied for an illegal or unauthorized purpose. *Hayman v. City of Grand Island* 873

Trial. SEE APPEAL. CRIMINAL LAW.
1. A motion for a directed verdict admits the truth of adversary's evidence and entitles him to the benefit of inferences reasonably deducible therefrom. *Rankin v. J. L. Brandeis & Sons* 86
2. Appointment of an interpreter rests largely in the court's discretion. *Labs v. Farmers State Bank* 130
3. On a trial of a law action to the court without a jury, the court on request must separately state conclusions of fact and law. *Condon Co. v. Loup River Public Power District* 284
4. In personal injury action, permitting jury to examine mechanism controlling operation of a street car door alleged to have caused the injury, *held* proper under instructions given. *Denison v. Omaha & C. B. Street R. Co.* 307
5. Instructions are to be considered together. *Gallagher v. Law* 381
6. Failure to define the words "gross" and "slight," as used in an instruction on comparative negligence, is not error, since they are words of common use. *Gallagher v. Law* 381
7. Denial of motion for a directed verdict is proper, where there is substantial conflict in the evidence. *Wert v. Equitable Life Assurance Society* 654
8. Trial court may properly direct verdict for plaintiff where evidence sustains cause of action and is insufficient to sustain verdict for defendant. *Refrigeration Discount Corporation v. Richards* 856

Trusts.
1. The manner in which a trustee shall exercise his power rests ordinarily within his own discretion and judgment, but if he exceeds his powers, acts negligently, or abuses his discretion, courts can grant relief. *In re Estate of Vohland* 77
2. The fact that a court, if discretion had been conferred upon it, would have exercised the power differently is not

ordinarily a sufficient reason for interfering with exercise of power by a trustee. *In re Estate of Vohland*.... 77
3. Endorsement of a note in name of a business trust by its secretary did not impose personal liability on individual trustees. *Plum v. Siekmann*..... 101
4. The name adopted by a business trust and provision in its articles of agreement that such name shall be the collective name of the trustees and used as a convenient designation of the trustees and their successors in trust in their conservative capacity does not make such name the trade or assumed name of the trustees individually. *Plum v. Siekmann*..... 101
5. Failure of cotrustees in a business trust to stipulate against personal liability on note indorsed by one trustee did not make the cotrustees personally liable. *Plum v. Siekmann*..... 101
6. The trustees of a common-law trust are not personally liable on notes indorsed by or on behalf of the trust. *Plum v. Siekmann*..... 101
7. Conveyance of land by absolute deed to serve a specific purpose of grantors and grantee, who are owners in equal shares, creates a resulting trust, where the intention of all the parties is to retain the beneficial interests, and the purpose may be shown by parol, and is not within the statute of frauds. *Windle v. Kelly*..... 143
8. Where one employed as agent to purchase realty for another becomes the purchaser himself, he will be deemed to hold the property in trust for his principal, subject to reimbursement for proper expenditures. *Lamb v. Sandall*..... 300

Usury.

1. An automobile dealer may in good faith sell an automobile on time for a price exceeding the cash price without tainting the transaction with usury. *American Loan Plan v. Frazell*..... 718
2. Where original purchase of automobile on credit was valid, it is immaterial, on question of usury, that a finance company solicited contracts from automobile dealers and furnished schedules. *American Loan Plan v. Frazell*..... 718
3. Purchase of note at discount beyond legal interest does not render transaction usurious. *American Loan Plan v. Frazell*..... 718

Vendor and Purchaser.

1. A covenant by a purchaser to pay and by the vendor to

convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, at least, proof of readiness and willingness to perform. *Klapka v. Shrauger* 354

2. Where time is not of the essence of a contract for sale of realty, the vendor is entitled to reasonable time to perfect title. *Klapka v. Shrauger* 354
3. If the date of performance of a contract for sale of realty is fixed and not far in the future, courts will be liberal in allowing the vendor reasonable time to perform, where time is not of the essence of the contract. *Klapka v. Shrauger* 354

Waters.

1. The statutory requirement for written notice to an irrigation district of a claim for damages for negligence in delivering or failure to deliver water to an irrigator entitled thereto does not apply to damages for breach of contract to furnish water for irrigation. *Ledingham v. Farmers Irrigation District* 276
2. Evidence *held* insufficient to show that diversion dam and reservoir of defendant caused an ice jam which resulted in flooding plaintiff's lands. *Welsh v. Platte Valley Public Power and Irrigation District* 441
3. An appropriator of water for irrigation purposes who has had his appropriation legally adjudicated secures a vested property right. *Enterprise Irrigation District v. Willis* 827
4. Prior to 1895 an appropriation of water for irrigation purposes was not limited as to quantity except that it must be for a useful and beneficial purpose and within limits of capacity of diversion works. *Enterprise Irrigation District v. Willis* 827
5. The "duty of water" is such a quantity of water necessary when economically conducted and applied to land without unnecessary loss as will result in successful growing of crops. *Enterprise Irrigation District v. Willis* 827
6. In determining the quantity of water that can be put to beneficial use of an appropriator, the policy of the law is to require within reasonable limits the greatest duty of water. *Enterprise Irrigation District v. Willis* 827
7. In determining the duty of water, the amount of water delivered to land and not the amount diverted from the

stream must govern. *Enterprise Irrigation District v. Willis* 827
8. The "duty of water" is a question of fact to be determined in accordance with prevailing customs in the locality where it is used. *Enterprise Irrigation District v. Willis*..... 827
9. The state may regulate and control irrigation and distribution and use of water therefor by virtue of police power. *Enterprise Irrigation District v. Willis*.... 827
10. Prevention of wasting of water or diversion of more water than can be put to beneficial use is a proper exercise of police power. *Enterprise Irrigation District v. Willis*..... 827
11. Where a river gradually recedes, changing the channel and leaving the land which was theretofore covered by water dry, such land belongs to the riparian proprietor. *Conkey v. Knudsen*..... 890

Wills.

1. Under a will directing the executor to provide all the comforts of life for the widow, he may expend such sums as in his judgment may be necessary without first securing an order of the probate court, since courts only act in such matters when the executor-trustee abuses his discretion or acts in bad faith. *In re Estate of Vohland* 77
2. In determining the meaning of particular parts, the testator's intention is to be determined from the entire will. *Kenfield v. Dudek*..... 574
3. Generally, a codicil lawfully executed operates as a republication of the will, so far as the will is not altered or revoked by the codicil, and the will and codicil are regarded as one instrument, speaking from date of codicil. *Kenfield v. Dudek*..... 574
4. Provisions in will for benefit of testator's widow should be liberally construed in her favor, especially when made for her support or accepted by her in lieu of her rights under intestate laws. *Kenfield v. Dudek*..... 574
5. Provisions of a codicil may have the effect of removing an ambiguity on the face of the will. *Kenfield v. Dudek* 574
6. Will and codicil construed and *held* to vest in widow existing residue of estate. *Kenfield v. Dudek*..... 574
7. Where a specific legatee and a residuary legatee are the only persons interested, they may agree upon a disposition of the legacy different from that provided for in the will. *In re Estate of Jensen*..... 602

Witnesses.

1. Testimony of widow with reference to conversations with deceased in regard to an alleged gift of an automobile is not rendered competent by introduction by executor of the note given by deceased in payment therefor and her identification of signature of deceased on same. *In re Estate of Nielsen* 110
2. In a suit for specific performance of parol contract to will property, a brother of plaintiffs who had no direct interest in the result of the suit was competent to testify to conversations with deceased. *Craig v. Seebecker* 221
3. Relationship may affect credibility of a witness, but not his competency. *Craig v. Seebecker* 221
4. Provision in policy that insured might investigate matters on which any claim might be based constituted a waiver of privileged communication by insured. *Wolski v. National Life & Accident Ins. Co* 643
5. Provision in policy that proofs of death should contain answers to each question propounded to physicians constituted a waiver of privileged communication by insured. *Wolski v. National Life & Accident Ins. Co* 643
6. Where a witness has made a written statement before trial, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement. *Mason v. Reynolds* 773

Work and Labor.

Presumption that an adult child who performed valuable services for her parents did so gratuitously may be overthrown by evidence of an oral contract for compensation. *In re Estate of Skade* 712